UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,

Defendant.

Case No. 20-cv-1286

JURY TRIAL DEMAND

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT FEDERAL INSURANCE COMPANY'S MOTION FOR DISQUALIFICATION

Defendant Federal Insurance Company (hereinafter, "Federal"), by and through its attorneys, Cozen O'Connor, hereby submits this Memorandum of Law in support of its Motion for Disqualification in order to recuse The Honorable Judge Arthur J. Schwab in the above-entitled action pursuant to 28 U.S.C. § 455. For the reasons set forth herein, Defendant respectfully requests that the Court recuse itself from further involvement in this case.

I. INTRODUCTION

Federal brings this motion in response to the Court's self-disclosure, during a status conference on October 28, 2020, of personal relationships with numerous members of the Board of Trustees ("Board") of Plaintiff Historical Society of Western Pennsylvania ("Plaintiff"). This motion is brought pursuant to this Court's Order that any motion to disqualify the Court must be made before 12:00 P.M. on Wednesday, November 11, 2020.

As detailed *infra*, the Court's significant personal relationships with members of Plaintiff's Board give rise, regardless of subjective reality, to an objective "appearance" of bias in favor of

Plaintiff. As such, the Court should recuse itself from this matter in accordance with 28 U.S.C. § 455.

II. FACTUAL AND PROCEDURAL BACKGROUND

a. Nature of the Action

Plaintiff "owns and operates the Senator John Heinz History Center ("Heinz Center"), as well as other museums and historic sites in the Commonwealth of Pennsylvania." (Doc #1, Complaint, ¶ 8). Plaintiff initiated this action against Federal, pursuant to its Complaint dated August 31, 2020 ("Complaint"), seeking declaratory relief arising from a contract of insurance issued by Defendant (the "Policy"), Plaintiff seeks, *inter alia*, a declaration that the Policy provides coverage for business interruption losses in an amount greater than $150,000 "[i]n light of the global coronavirus disease 2019 ("COVID-19") pandemic and state and local government orders ("Civil Authority Orders") mandating that all non-essential in-store business must shut down." (*Id.*, ¶ 2).

Defendant filed its Answer with Affirmative Defenses on November 6, 2020, in which, *inter alia*, it denies that the Policy provides insurance coverage for the Plaintiff's claim of loss because there is no direct physical loss or damage to covered property belonging to the Plaintiff. (Doc #19).

b. The Court's Personal Relationship with Plaintiff's Board of Trustees

At the October 28, 2020 Status Conference, the Court disclosed that it has close, active personal friendships with several members of the Board of Plaintiff and related museums.[1] The Court explained the nature of its relationship with those serving on the Board: the Court has a personal relationship with Board members who have been invited to and spent time in the Court's

[1] The Court's Hearing Memo issued after the Status Conflicts memorialized that "[t]he Court advised counsel of his relationship with so many members on the board of the Historical Society of Western Pennsylvania." (Doc. #18)

home; the Court is a member of the Duquesne Club[2] along with Board members; a Board member's personal residence is a few houses down from the Court in the same neighborhood; and a Board member performed surgery on the Court.

It further appears, upon information and belief, that during at least one point within the past decade, the Court was a "Member" of the Heinz Center.[3] As of November 8, 2020, individuals seeking to become a "member" of the Heinz Center are required to "Buy Membership" at the Center's museum.[4] Therefore, it is likely, if not certain, that as recently as 2014, the Court made financial contributions to Plaintiff in support of its operations.

The Board's control and influence over Plaintiff's finances is extensive.[5] In fact, the Board's top priorities as of October 28, 2020 are "securing the organization's long-term financial stability, expanding the museum's digital capabilities to reach broader audiences and acting on the museum's commitment to diversity, equity, inclusion and accessibility."[6] Therefore the dispute over the existence of insurance coverage that is the subject matter of this litigation directly affects the Board's main goal: financial stability.

The Board members' financial interest in Plaintiff goes beyond their collective role in ensuring the organization's financial stability. Plaintiff "engages in transactions in the normal

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[2] The Duquesne Club's website states: "To our members, the Duquesne Club is more than simply a place to relax or conduct business. It's a community. The Club is a place to meet colleagues and friends. It's a place to interact with like-minded people who push the boundaries of what it means to be a leader in today's society." *See* https://www.duquesne.org/membership/ (last accessed Nov. 8, 2020).

[3] *See New Members*, 23 MAKING HISTORY NEWSLETTER at 6 (Fall 2014), https://www.heinzhistorycenter.org/wp-content/uploads/2014/11/2014-Fall-Making-History-Newsletter.pdf (listing the Court as a "Member") (attached hereto as Exhibit A).

[4] *See Join the Ranks of History*, Senator John Heinz History Center, https://www.heinzhistorycenter.org/join (last accessed Nov. 8, 2020).

[5] *Financial Statements For the years ended June 30, 2019 and 2018*, Historical Society of Western Pennsylvania, https://www.heinzhistorycenter.org/wp-content/uploads/2019/10/23603-FINAL-FS-Historical-Society-of-Western-Pennsylvania-063019-18-A-1.pdf (last accessed Nov. 8, 2020) (attached hereto as Exhibit B).

[6] Jesse Huba, *Howard Hannah chairman announced as new board chair of Heinz History Center*, TRIB LIVE, https://triblive.com/local/fox-chapel/howard-hanna-chairman-announced-as-new-board-chair-of-heinz-history-center/ (last accessed Nov. 8, 2020) (attached hereto as Exhibit C).

course of business with companies whose executives are members of the Board."[7] Also, certain members of the Board have made unconditional promises to give to Plaintiff,[8] which totaled $344,000 in 2019.[9] Board members have similarly provided direct funding to Plaintiff for the purchase of property and land, and paid for certain necessary expenses, such as the cost of demolishing a building on Plaintiff's property.[10]

Finally, the founding member of one of the firms providing legal counsel to Plaintiff in this case[11], Robert Peirce & Associates, is Robert N. Pierce, Jr., Esq., an active member of the Board himself.[12] It is not known at this time whether Mr. Pierce is an acquaintance of this Court, or if he is actively involved in this litigation, but the fact that a member of Plaintiff's Board is representing Plaintiff in this matter before this Court illustrates the extensive ties between Plaintiff's Board and this Court.

III. <u>ARGUMENT</u>

A. Legal Standard

A federal judge must recuse himself or herself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Moreover, section 455(b)(1) specifically requires a judge's recusal where the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Either provision may fairly capture the circumstances at hand here, as Section 455(a) operates as a "catchall recusal provision" intended to require recusal "whenever impartiality might reasonably be questioned."

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[7] *Financial Statements*, *supra* note 5, at p. 22.
[8] *Id.*
[9] *Id.* at p. 15.
[10] *Id.* at p. 23.
[11] *See The Robert Peirce & Associates, P.C. Team*, Robert Peirce & Associates, https://www.peircelaw.com/our-attorneys/ (last accessed Nov. 9, 2020) (identifying "Robert. N. Peirce Jr." as "Founding Partner").
[12] *See Board of Trustees*, SENATOR JOHN HEINZ HISTORY CENTER, (last accessed Nov. 9, 2020) https://www.heinzhistorycenter.org/about/board-of-trustees (identifying "Robert N. Peirce Jr., Esq." as member of Board) (attached hereto as Exhibit D).

Liteky v. United States, 510 U.S. 540, 548 (1994). As such, recusal is warranted here under both § 455(a) and § 455(b)(1).

Section 455 requires that recusal issues be evaluated "on an objective basis," meaning "what matters is not the reality of bias or prejudice but its appearance." *Conklin v. Warrington Twp.*, 476 F. Supp. 2d 458, 462 (M.D. Pa. 2007) (quoting *Liteky*, 510 U.S. at 548); *see also United States v. Ciavarella*, 716 F.3d 705, 718 (3d. Cir. 2013) ("[u]nder 28 U.S.C. § 544(a)…[t]he judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so") (emphasis in original). Where "a reasonable man knowing all circumstances would harbor doubts concerning the judge's impartiality," recusal is required. *Conklin*, 476 F. Supp. 2d at 463. As such, "[a] party seeking recusal need not show *actual* bias on the part of the court, only the *possibility* of bias." *Kelly v. Prudential Ins. Co. of Am.*, 148 F.3d 283, 343 (3d Cir. 1998) (emphasis added).

Except for rare instances when a judge's "opinions and remarks…reveal a 'deep-seated' or 'high degree' of 'favoritism or antagonism'" the basis for a judge's recusal is often "extrajudicial." *United States v. Wecht*, 484 F.3d 194, 213 (3d Cir. 2007). As this Court has stated, mere "disagreement with a judge's determinations certainly cannot be equated with the showing required to so reflect on his impartiality as to dictate recusal." *United States of America v. Vue*, No. 09-cv-0048, Document 120, at 75 (W.D. Pa. Sept. 20, 2010) (quoting *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1356 (3d. Cir. 1990)) (attached hereto as Exhibit E).

Indeed it is the case here that the Court's extrajudicial friendships and affiliation with Plaintiff give the "appearance" of "bias" warranting recusal, *not* the court's on-the-record statements. *Conklin*, 476 F. Supp. at 462. Where there exists a connection between an extrajudicial friendship and the litigation at hand, there may be sufficient grounds for recusal. *See United States v. Moskovits,* 866 F. Supp. 178, 181–82 (E.D. Pa. 1994) ("my close association with the University

of Pennsylvania—an association of twenty years' standing—might reasonably be perceived by an objective external observer as a factor that could influence me, even if unconsciously, to favor a result that would facilitate achievement of the University's announced purpose to prosecute Mr. Moskovits for perceived infractions of a University code of conduct.") Here, the connection is more extensive than one friendship and justifies recusal.

One federal court considered recusal where the court's "long-time personal friend" was a witness, recusing itself based on the witness's status as an "officer and a stockholder" of the defendant because the friend had a "financial interest in the outcome" of the case. *Hadler v. Union Bank & Trust Co.*, 765 F. Supp. 967, 978 (S.D. Ind. 1991). The court emphasized the basis for recusal was not simply because the court's friend was a witness, but because of "additional factors," namely the friend's financial interest and status as an officer and stockholder in the defendant organization. *Id.* at 979 (holding "it cannot be presumed that friendship with a witness, without more, will transform a judge into an advocate" but that the friend's "very specific financial interest…in the outcome of this case justifies recusal").

The court explained: "I believe that I can fairly and equally dispense justice in this case, but the test of § 455(a) is an objective, not a subjective one." *Id.* at 979. The court continued:

> Section 455(a) is designed to prevent the courts of justice from being besmirched by the shadow of the "appearance of partiality." Section 455, therefore, protects not only against actual impartiality which lurks in the mind of a judge, but it also protects against impartiality which might reasonably be suspected to lurk there. It is only to observe human nature to recognize that individuals are likely to be less suspicious about that which they can observe than about that which they cannot.

Id.

Looking to the *Hadler* decision, the Eastern District of Pennsylvania, in *Schneider*, distinguished the different facts of that case from *Hadler*, holding the court's recusal in *Halder* was "made…appropriate" largely by the judge's "friend's very specific financial interest in the

outcome of the case." *United States v. Schneider*, No. 10-29, 2018 U.S. Dist. LEXIS 235982 at *7, 2018 WL 10638567 *2 (E.D. Pa. Feb. 6, 2018). Where allegations of bias stem from a court's personal relationship with one individual, recusal is not warranted where the individual and court did not have "any kind of regular contact" for "at least a decade." *Schneider*, 2018 U.S. Dist. LEXIS 235982 at *5 n.1.[13] But where there is a current personal relationship between courts and a party to litigation or its counsel, federal courts regularly require recusal. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1523-24 (11th Cir. 1988) (holding judge was required to recuse himself where judge's law clerk was son of partner in law firm representing party to case); *United States v. Murphy*, 768 F.2d 1518, 1536-37 (7th Cir. 1985) (holding recusal required where judge had close friendship and planned family vacation with trial counsel).

B. The Existing Facts Require Recusal Under 28 U.S.C. § 455

Here, the facts at hand objectively, to a reasonable observer, create the appearance of a lack of impartiality. This Court has recognized that the reasonable observer standard requires that a judge's impartiality "not be assessed in disregard of the actual facts of record, but instead…from the perspective of a reasonable observer having knowledge of all the facts of record." *United States of America v. Vue*, No. 09-cv-0048 at 76 (W.D. Pa. Sept. 20, 2010) (attached as Exhibit E). The facts of record show the following:

The Plaintiff is a private organization that owns and operates museums. The organization is operated by a Board of Trustees. The Board of Trustees not only make key financial decisions,

[13]The *Schneider* opinion does not control, as it is factually distinguishable. In *Schneider*, the court rejected a motion for recusal over the court's personal relationship with opposing counsel. *Id.* The court acknowledged a relationship dating back to the "early 1980s" when the court and counsel worked together in the public defender's office. *Id.* Counsel also served on the court's campaign committee "when the Court ran for election to the Court of Common Pleas of Chester County" in 1997. Since then, however, the court noted its contact with counsel "waned" and the two had "not maintained an ongoing social relationship." *Id.* Emphasizing the "passage of time" and the "more than two decades" since counsel's involvement in the court's campaign, the court held "the relationship is not one that would lead a reasonable observer to question the Court's ability to impartially evaluate" the claims at issue in the case. *Id.*

but financially support Plaintiff's operations. Some Board members fund large-scale projects, and others conduct business with Plaintiff in their roles as company officers and executives. The Board's current top priority, in light of the COVID-19 pandemic, is "securing the organization's long-term financial stability." The Board members, as substantial donors, business partners, and managers of the organization, have a vested interest in securing insurance coverage through this litigation, professionally, personally, and financially.

The Court has ongoing, active, friendships with numerous Board members who have a vested interest in Plaintiff's outcome in this litigation. Board members have been invited to the Court's home, belong to the same private membership club as the Court, and have performed surgery on the Court. It cannot be said the Court has a singular friendship with one Board member that has "waned" to the point of lacking regular contact for the past decade as in *Schneider*. Rather, the Court has active, and ongoing friendships with some of those on the Board. A Board member even runs one of the law firms representing Plaintiff in this matter before the Court.

Similar to *Hadler*, the Court's friends hold high-ranking positions within the Plaintiff organization. Some Board members have an even greater stake in the litigation, especially those who make substantial financial contributions to the organization and those who deal with Plaintiff itself in their dual capacities as executives of other companies. In light of these facts, a reasonable observer would harbor doubts about the Court's impartiality given the numerous active, meaningful personal connections between the Court and several individuals who have a personal stake in the outcome of these proceedings.

Importantly, the Court was a "member" of the Heinz Center as least as recently as 2014 and the Court would likely have made a personal financial contribution to the Heinz Center. This fact itself gives rise to an appearance of partiality in favor of Plaintiff by this Court.

The Court may hold a sincere and honest belief that it can be impartial in presiding over this case, and Defendant does not suggest otherwise. However, "what matters is not the reality of bias or prejudice but its appearance." *Conklin v. Warrington Twp.*, 476 F. Supp. 2d at 462. Applying the facts at hand to this objective standard, the Court should conclude that recusal is appropriate under 28 U.S.C. § 455.

IV. CONCLUSION

The facts of this case create the appearance of bias to an objective, reasonable observer. As such, Defendant, Federal Insurance Company, respectfully requests the Court grant this Motion to Disqualify and recuse itself from presiding over this matter.

Respectfully submitted,

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Dated: November 11, 2020

Attorneys for Defendant

EXHIBIT A

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VOLUME 23 • NO. 2 • FALL 2014

MAKING HISTORY

The Newsletter of the Senator John Heinz History Center
In Association with the Smithsonian Institution

History Center Pours It On With New Heinz Exhibition

The 145-year history of the iconic Pittsburgh-based company is highlighted with unique artifacts, cutting-edge interactive activities, and innovative displays in this new exhibit.

The Senator John Heinz History Center recently launched its newest long-term exhibit showcasing the local origins and international reach of one of the world's most beloved food brands.

The new ***Heinz*** exhibit chronicles the H.J. Heinz Company's evolution from a small food purveyor into one of the most recognizable international brands.

Throughout the exhibit, visitors will discover how the Heinz family business that began with eight-year-old Henry John Heinz selling produce from his mother's garden in Sharpsburg grew to a worldwide company with more than 5,700 products in 200 countries.

Highlights of the new exhibit include:

- **A larger-than-life, 11-foot ketchup bottle** comprised of more than 400 individual bottles alongside a display of more than 100 historic bottles that show the evolution of Heinz products and packaging;
- **Innovative displays on the history of Heinz**, including videos chronicling the genealogy of the family and an interactive table focusing on Heinz's international popularity;
- **A life-like figure of 10-year-old H.J. Heinz**;
- **Vintage Heinz TV ads from around the world**;
- **A display of iconic Heinz pickle pins**, including the first charm from the 1893 World's Fair in Chicago;
- **Items from former Heinz brand advertising campaigns**, such as a 9Lives director's chair used by Morris the Cat and a life-size costume of StarKist's Charlie the Tuna; and
- Never-before-seen artifacts from the collections of the History Center and the Heinz Family Archives, including H.J. Heinz's desk set and H.J.'s hand-written ledger, recipe book from 1869, rare memorabilia, and hundreds of Heinz bottles.

For more than 20 years, the History Center has been home to the world's largest collection of artifacts and archival materials related to Heinz. The new exhibit showcases the rich history, commitment to quality, and innovative spirit of the company that abides by H.J.'s famous motto, "To do a common thing uncommonly well brings success."

The History Center gratefully acknowledges the **H.J. Heinz Company** for its generous support of the ***Heinz*** exhibit.

The exhibit is included with regular museum admission: $15 for adults, $13 for seniors (age 62+), $6 for students and youth (age 6-17). Children under 5 and History Center members get in free. For more information, please visit **www.heinzhistorycenter.org**.

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The History Center's museum shop and e-store feature a variety of Heinz products. To shop online, please visit www.heinzhistorycenter.org/estore.

The Heinz Tomato Ketchup Cookbook $12.95
Enjoy a savory and sweet collection of 40 ketchup recipes.

Heinz Mug $10.00
How much do you love Heinz? Count the words with this ceramic mug honoring everyone's favorite food brand.

Ketchup Label Onesie $14.95
Dress your little bundle of joy in this onesie (sizes 6, 12, 18, and 24 months).

I put Ketchup on My Ketchup T-Shirt $19.95
Show your pride for your favorite condiment with this super-soft Heinz ketchup t-shirt (sizes M-L-XL).

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COMING UP

New Museum Conservation Center Helps Preserve Treasures for Future Generations

History Center President and CEO Andy Masich inspects an antique quilt with conservator Nancy Boomhower at the History Center's new Museum Conservation Center.

The increasing public demand for information and services on how to care for and preserve family heirlooms and antiques has prompted the History Center to open a new building that will become the hub for artifact conservation services in Western Pennsylvania.

The Museum Conservation Center – located behind the History Center at 1221 Penn Ave. in the Strip District – provides visitors with expert advice on how to preserve their treasures, including works of art, photographs, wedding dresses, furniture, and much more. The facility also connects visitors with conservators should their heirlooms require professional repair.

With the opening of the Museum Conservation Center, the History Center is one of the first museums in the nation to provide professional conservation services directly to the public.

The nine-floor LEED-Certified Green Building also houses the History Center's collection, which includes over 32,000 artifacts. The new 55,000-square-foot storage space features Smithsonian-quality lighting, temperature, humidity, pest control, and security.

For more information on the Museum Conservation Center or to schedule an appointment, please contact Barb Antel, conservation services manager, at 412-454-6450 or bjantel@heinzhistorycenter.org. Additional information is also available online at **www.heinzhistorycenter.org**.

New Visible Storage Area Takes Museum Visitors Behind the Scenes

Beginning this winter, visitors can take a behind-the-scenes look at the History Center's Smithsonian-quality preservation and storage spaces.

The new visible storage area, part of the Sigo Falk Collections Center on the museum's fourth floor, will offer visitors the opportunity to explore areas of the History Center that were previously off-limits to the general public, including the museum's conservation lab, photography studio, artifact mount-making station, and more.

As visitors move from the Falk Collections Center through the visible storage space, they will learn how curators collect, catalog, and document objects for the museum's collections.

The new space will feature a variety of paintings, housewares, toys, clothing, accessories, firearms, and additional objects from the History Center's collection that have never been on public display.

For more information about the Sigo Falk Collections Center and visible storage space, please contact Anne Madarasz, museum division director, at 412-454-6352 or apmadarasz@heinzhistorycenter.org.

Museum Conservation Center Workshop Calendar

A series of workshops in the new Museum Conservation Center are planned throughout the year in which visitors can learn museum-quality techniques for preserving their cherished heirlooms.

Family Archives Workshop: Part II

Saturday, Nov. 22, 2014
10 a.m. – 12:30 p.m.

This workshop will feature personalized content and an in-depth presentation on how participants can conserve their paper documents. Guided by Museum Conservation Center staff, visitors can bring in a paper-based item and learn best practices to organize their own materials for safekeeping.

Admission to the workshop is $35 for regular visitors and $30 for History Center members. Space is limited and pre-registration is required. An optional Workshop Kit may also be pre-ordered at the time of registration for an additional cost of $30.

Holiday Heritage Workshop

Thursday, Dec. 11, 2014
6:30 – 7:30 p.m.

This informative demonstration will educate participants about preservation practices for family heirlooms, using the holiday theme as a framework. The workshop will focus on how to lightly clean, display, and store those delicate ornaments, linens, antique china, and silver.

Admission to the workshop is $20 for regular visitors and $15 for History Center members. Space is limited and pre-registration is required.

REGISTRATION: To register for these workshops and for more information on the Museum Conservation Center, please contact Barb Antel, conservation services manager, at 412-454-6450 or bjantel@heinzhistorycenter.org, or visit us online at **www.heinzhistorycenter.org**.

Don't Miss the Boat! Steamboat Arabia Exhibition Closes Jan. 4

Discover a local treasure before it disappears by visiting the History Center's new exhibition, which examines a fascinating story of sunken treasures, discovery, and preservation.

Pittsburgh's Lost Steamboat: Treasures of the Arabia, which closes on Jan. 4, features the largest time capsule of pre-Civil War items ever discovered.

Built in Brownsville, Pa. and Pittsburgh in 1853, the Steamboat Arabia traveled extensively to frontier towns along the Ohio, Mississippi, and the Missouri Rivers. The vessel included more than one million objects bound for general stores and pioneer settlements in the West.

During its final journey in 1856, the Arabia hit a tree snag and sank in the Missouri River near Kansas City, Mo. Nearly 150 years later, a group of modern-day treasure hunters rediscovered the Arabia buried 45 feet below a cornfield a half-mile from the river. Remarkably, the anaerobic (oxygen-free) environment perfectly preserved most of the boat's cargo, including fine dishware, clothing, and even bottled food all preserved in excellent condition.

This is the final chance for visitors to see the 2,000 once-hidden treasures, including perfectly-preserved, 160-year old pickles still green in the original glass jar; hundreds of everyday items from the 1850s ranging from shoes and dresses to hand tools and silver serving trays; and several Sharps Model 1853 rifles.

Pittsburgh's Lost Steamboat: Treasures of the Arabia is sponsored by David McCullough, BNY Mellon, The Hillman Foundation, UPMC Health Plan, W. P. Snyder III Charitable Fund, The Bozzone Family Foundation, Dollar Bank, Beverlynn & Steven Elliott, The Heinz Endowments, Jendoco, the Master Builders of Western PA, Ann & Marty McGuinn, Mylan, and the Richard King Mellon Foundation. For more information, please visit **www.heinzhistorycenter.org**.

The Civil War in Pennsylvania

The History Center's traveling exhibition, ***The Civil War in Pennsylvania***, created in partnership with Pennsylvania Civil War 150, will continue to visit History Center Affiliate Program sites throughout the next five months. The exhibit, presented by **Peoples Natural Gas** and supported by the **Institute of Museum and Library Services (IMLS)**, focuses on Pennsylvania's contributions to the Civil War through life-like museum figures, artifacts, and never-before-seen photographs.

UPCOMING DATES:

Oct. 4 – Nov. 4, 2014
Greene County Historical Society (Waynesburg, Pa.)

Nov. 8 – Dec. 2, 2014
Blair County Historical Society (Altoona, Pa.)

Dec. 6, 2014 – Jan. 6, 2015
Warren County Historical Society (Warren, Pa.)

Jan. 10 – Feb. 3, 2015
Bottle Works Ethnic Arts Center (Johnstown, Pa.)

For more information about ***The Civil War in Pennsylvania*** traveling exhibit, please contact Jaclyn Esposito at 412-454-6430 or jgesposito@heinzhistorycenter.org or visit **www.heinzhistorycenter.org/civilwar**.

We Can Do It! Upcoming Exhibition to Examine Pittsburgh's Impact During WWII

Pennsylvania served as the Arsenal of Democracy during World War II, providing not only soldiers for the war effort but also workers, materials, munitions, and innovations that helped turn the tide of the war.

On April 25, 2015, the History Center will premiere ***We Can Do It! WWII***, a major exhibition focusing on Western Pennsylvania's role on the home, industrial, and battle fronts during World War II.

The 7,500-square-foot exhibit will explore the development of the Jeep, a uniquely American invention produced by the American Bantam Car Company in Butler, Pa. and reveal the stories behind real-life "Rosie the Riveters" and local Tuskegee Airmen whose contributions made an unquestionable impact on the war effort. Featuring rare artifacts, life-like museum figures, interactive displays, and immersive museum settings, ***We Can Do It!*** will bring the 1940s to life as the nation commemorates the 70th anniversary of the conclusion of WWII.

The History Center is partnering with several institutions to enhance the exhibit, including the Smithsonian Institution, Pennsylvania Historical and Museum Commission, Soldiers and Sailors Museum, Holocaust Center of Pittsburgh, Veteran's Voices, Bantam Jeep Heritage Festival, and more.

For more information about ***We Can Do It! WWII***, please contact Leslie Przybylek at 412-454-6427 or laprzybylek@heinzhistorycenter.org.

Pearl Harbor Memories with the Veterans Breakfast Club

Saturday, Dec. 6, 2014 • Noon

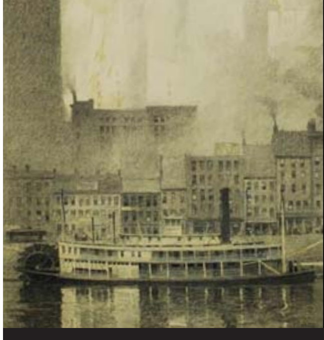
Join nearly 40 former U.S. servicemen and women from the Veterans Breakfast Club as they share memories of the "date which will live in infamy" to commemorate the 73rd anniversary of the attack on Pearl Harbor. Visitors are invited to listen in as the veterans participate in an open mic forum in the History Center's Great Hall and share how Dec. 7, 1941 changed their lives forever.

History Center curators will also be on hand to provide a brief preview of the new ***We Can Do It! WWII*** exhibit with highlighted artifacts and archival materials. Following the Veterans Breakfast Club open forum, the Detre Library & Archives is partnering with Veterans Voices to invite local World War II veterans to record their memories for future generations in the museum's new Oral History Studio.

In honor of Pearl Harbor Day, all U.S. veterans and current servicemen and women will receive free admission to the museum on Saturday, Dec. 6 and Sunday, Dec. 7.

Thornton Oakley's Pittsburgh

The History Center is showcasing six drawings by Pittsburgh-born artist Thornton Oakley as part of a new exhibition, ***Thornton Oakley's Pittsburgh***. The drawings capture the city as it looked in 1913, unveiling layers that juxtapose old and new, including a working river boat backed by 19th century buildings that served as wholesale and retail outlets along the old Mon Wharf. For more information about ***Thornton Oakley's Pittsburgh***, please contact Anne Madarasz at 412-454-6352 or apmadarasz@heinzhistorycenter.org.



The drawings of the History Center's new exhibition, ***Thornton Oakley's Pittsburgh***, allow visitors to see the city as it looked a century ago when downtown became the corporate center of our region.

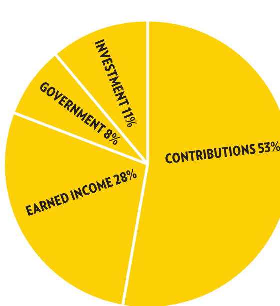
Annual Report
Fiscal Year 2014

The History Center recently completed its 2014 fiscal year. Take a look back at some of the highlights from the past 12 months. With award-winning exhibits and publications, extraordinary events and programs, and unmatched educational outreach, the History Center continues to reach new and diverse audiences, with much more to come this year.

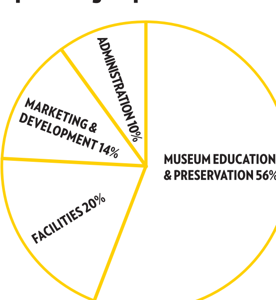
FINANCES

Operating Revenue

$9.3 MILLION TOTAL OPERATING BUDGET



Operating Expense



AWARDS

Received the American Association for State and Local History (AASLH) Award of Merit for "The Civil War in Pennsylvania: The African American Experience" book.

Received the AASLH Award of Merit, PA Museums 2014 President's Award, and the S.K. Stevens Award for the ***From Slavery to Freedom*** exhibition.

MUSEUM

Moved the entire museum collection from off-site storage to the new Museum Conservation Center.

Opened two major exhibitions, including ***Poptastic: The Art of Burton Morris*** and ***Pittsburgh's Lost Steamboat: Treasures of the Arabia*** featuring over 2,000 objects.

Secured a temporary loan of **Bill Mazeroski's 1960 World Series Game 7 uniform and home run bat.**

Added 124 collections with more than 700 objects, including **a painting by John Kane** from the H.J. Heinz Company, a **collection of long rifles** (pictured) from Bayer, **material from the Mister Rogers set** from the Fred Rogers Company, and a **suit worn by Gene Kelly in the movie "Singin' in the Rain."**

EDUCATION

Held six successful annual public programs, including **Vintage Pittsburgh, Hometown-Homegrown,** and **Pittsburgh's Hidden Treasures,** plus over 20 community-based programs.

Increased school programs by partnering with **Pittsburgh Public Schools** to provide socioeconomically diverse audiences with the museum experience.

Began **Hop into History** programs designed for 2-5 year-olds and their caregivers to enhance the museum experience through hands-on exploration, music, and movement.

Launched a **digital badging program** with the Sprout Fund's City of Learning and worked with the Smithsonian to develop two Pittsburgh-based badges for their existing program.

EVENTS

Hosted **248 facility rental events** this year, including Mayor Bill Peduto's inauguration celebration for 3,500 visitors.

MUSEUM SHOP

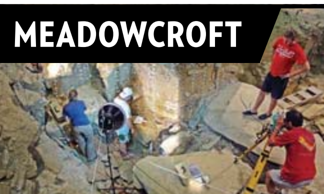
Renovated the **Museum Shop's Book Room** into an inviting and elegant space for visitors, while also negotiating a new merchandising agreement to increase the breadth of items from the **H.J. Heinz Company.**

FORT PITT MUSEUM

Opened the ***Unconquered: History Meets Hollywood at Fort Pitt*** exhibition.

Reached thousands of visitors through **living history and cannon firing programs** in Point State Park.

MEADOWCROFT



Featured in **USA Today** as part of the archaeological excavation at the Rockshelter.

Hosted the **16th Annual Atlatl Competition** in partnership with the World Atlatl Association.

DEVELOPMENT

RAD works here

Received 4,500 gifts from individuals, board members, corporations, foundations and government sources, including a tenth consecutive year of increased funding from the Allegheny Regional Asset District (RAD).

THE BARENSFELD FAMILY PROVIDED GENEROUS ENDOWMENT SUPPORT.

Increased the endowment by nearly $2 million, helping to ensure the future stability of the organization.

Enjoyed the second-most successful **History Makers Award Dinner** by honoring Mel Blount, Nadine Bognar, Joe Grushecky, Jack Piatt, and Nancy and Milton Washington.

Exceeded fundraising goals for all FY2014 fundraising events, including **History Uncorked,** the **Celebrity Golf Tournament,** and the **Bocce Tournament.**

LIBRARY & ARCHIVES

Created **650 new finding aids** that are now available on the Historic Pittsburgh website.

Spent approximately **155 hours on internal reference and research help and answered another 1,500 external reference questions** by phone, email, letter, and in-person.

Acquired more than 185 archival collections, including Mayor Bill Peduto's city council records, international artist Jane Haskell's papers, film footage of John F. Kennedy's visit to Pittsburgh, and materials documenting the history of the United Way and PPG (pictured above).

COMMUNICATIONS

Named **"Best Museum"** by Pittsburgh Magazine readers.

Garnered **106,027,439 media impressions** (print, TV, radio, online), **407 unique media clips, and national stories** in USA Today, CNN, Travel Channel, Smithsonian magazine, Associated Press, Washington Post, and more.

ATTENDANCE

SENATOR JOHN HEINZ HISTORY CENTER IN ASSOCIATION WITH THE SMITHSONIAN INSTITUTION

296,490 visitors

Year	Visitors
FY2014	296,490
FY2013	220,602
FY2012	179,203

FORT PITT MUSEUM

39,904 visitors

Year	Visitors
FY2014	39,904
FY2013	30,794
FY2012	21,591

MEADOWCROFT ROCKSHELTER AND HISTORIC VILLAGE

17,094 visitors

Year	Visitors
FY2014	17,094
FY2013	15,395
FY2012	15,857

VOLUNTEERS

Volunteered 26,283 hours (an 8% increase from last year).

Ranked as **#2 museum in Pittsburgh** and **#6 overall attraction in Pittsburgh** by TripAdvisor.

Twitter

13,087 Twitter followers
24% increase from last year

6,892 Facebook fans
25% increase from last year

Education Station: Teacher Workshops

Join History Center educators, curators, and local experts for workshops and educational sessions designed to connect teachers with the museum's exhibits. Each session provides three Act 48 continuing professional development credits. The 2014-2015 school year programs offer a variety of subjects, including:

A World on Fire: Western Pennsylvania as Battleground
Thursday, Nov. 6, 2014 • 5 – 8:30 p.m.

Regional Differences in Slavery: A Primary Source Approach
Thursday, Jan. 22, 2015 • 5 – 8:30 p.m.

Social Studies and STEM Integration
Thursday, Feb. 5, 2015 • 5 – 8:30 p.m.

The Economy of 18th Century Western Pennsylvania
Thursday, Feb. 26, 2015 • 5 – 8:30 p.m.

Preserving the Personal: Stories Scrapbooks Tell and How to Preserve Them
Thursday, March 26, 2015 • 5 – 8:30 p.m.

World War II: Life on the Home Front
Thursday, April 30, 2015 • 5 – 8:30 p.m.

Forging Freedom: Pittsburgh's Wartime Steel Industry
Saturday, May 16, 2015 • 10 a.m. – 2:30 p.m.

Admission for each workshop is $15 for History Center members and $20 for non-members. Pre-registration is required online at **www.heinzhistorycenter.org/education**. For more information, contact Kate Lukaszewicz at 412-454-6314 or kalukaszewicz@heinzhistorycenter.org.

FORT PITT MUSEUM

Last Chance to See Unconquered Exhibit

Discover Pittsburgh's history as "Hollywood on the Mon" in the exhibition, ***Unconquered: History Meets Hollywood at Fort Pitt***, before it closes Friday, Oct. 31.

The exhibit, sponsored by the **Laurel Foundation**, explores the story behind the siege of Pittsburgh following the French & Indian War and the star-studded 1947 Cecil B. DeMille film "Unconquered."

In the summer of 1763, American Indians participating in a broader movement known as Pontiac's Rebellion attacked Fort Pitt and Pittsburgh.

Using rarely-seen original movie props, photographs, and costumes alongside 18th-century artifacts and documents, ***Unconquered*** explores a turning point in American history and contrasts the historical events with the Hollywood depiction. The film, which premiered in 1947 at Loew's Penn Theatre (now Heinz Hall) in Pittsburgh, is shown daily at the Fort Pitt Museum.

This year marks the 250th anniversary of Pontiac's Rebellion and the siege of Fort Pitt. To commemorate the anniversary, the Fort Pitt Museum presents an exhibition that explores the historical events of the siege as well as its Hollywood depiction.

Fort Pitt Museum to Honor Veterans with Living History Program
Saturday, Nov. 8, 2014 • 10 a.m. – 4 p.m.

In honor of Veterans Day, the Fort Pitt Museum will host Military through the Ages, a special day of living history demonstrations in conjunction with the Steel City Salutes the Troops program at Point State Park.

The Military through the Ages event will examine how soldiers lived and fought during the French & Indian War, the Revolutionary War, Civil War, and World War II eras. The Fort Pitt Museum's colonial re-enactors will perform weapons demonstrations and fire the museum's replica British six-pounder cannon throughout the day.

For more information, please visit us online at **www.heinzhistorycenter.org** and click on the Fort Pitt Museum tab or contact Alan Gutchess at 412-281-9284 or agutchess@heinzhistorycenter.org. The Fort Pitt Museum is the most affordable family-friendly cultural experience in the region. Admission is $6 for adults, $5 for senior citizens, and $3 for students and youth ages 6-17. Children under 6 and History Center members get in free.

New Members

Mr. Michael Ackerman
Mr. David Argent
Ms. Patricia Arnett
Ms. Kristi Ashley
Ms. Cheryl Astorino
Mr. & Mrs. James Aversa
Mr. William & Dr. Elizabeth Baker
Ms. Gretchen Y. Baker
Mr. Raymond M. Balach
Ms. Cindy A. Barnhart
Ms. Shari Bechtel
Mr. & Mrs. Raymond Becker
Mr. Paul Becker
Patrick & Valerie Birch
Mr. Andrew S. Bissot
Ms. Debra Blackburn
Ms. Anita Bliss
Mr. Mark Bodenschatz
Ms. Pamela Boehm
Mrs. Alyssa Boehringer
Ms. Vera Bonnet
Mr. & Mrs. Robert H. Bosetti
Mr. & Mrs. Charles T. Bouvy
Ms. Jenny Briggs
Mr. & Mrs. Tom Buckel
Ms. Katherine Bunge
Lauren & Alex Burns
Mr. Andrew Butcher
Katie & Chad Butler
Ms. Kimberly A. Butler
Mr. Justin Calderone
Ms. Marian J. Campbell
Ms. Terri Cardellino
Mr. & Mrs. Robert Carnahan
Mr. David C. Carter
Mr. & Mrs. Glenn R. Cavanaugh
Ms. Ruth Christensen
Ms. Jessica Christiansen
Mr. Steven Chrobak
Mr. Wayne H. Claeren
A. Clark
Mr. Scott Cochenour
Ms. Francine E. Cochis
Ms. Connie Coffelt
Mr. Tylar Colleluori
Mr. Michael Cook
Mr. & Mrs. Bruce Cook
Mr. Neil Cosgrove
J. Stephen & Cynthia Cowles
Mr. & Mrs. Daniel H. Cox
Ms. Barbara Cross
Mr. & Mrs. Kevin Cunningham
Julia D'Alo & Blair Dierks
Mr. & Mrs. Daniel Damratoski
Mr. Evan Daverio
Randy Davis
Ms. Margaret DeArdo
Mr. Harold Deiss
Ms. Barbara Dieschbourg
Mr. Chris Dill
Mr. Robert J. Doman
Mr. Ryan Dumont
Mr. & Mrs. William Ebitz
Ms. Amy C. Faucher
Mr. & Mrs. Thomas Ferris
Mr. & Mrs. Kenn Fetterman
Mrs. Linda B. Fiejdasz
Janet & John Fisher
Ms. Kristen Fitzgerald
Mr. David M. Florijan
Mr. Frank Flowers
Ms. Marcia Foertsch & Ms. Stacey Sestok
Susan & Elkin Fowler
Ms. Kim Frenette
Mr. & Mrs. Joshua Friedman
Ms. Darlene E. Gallagher
Ms. Lisa M. Genton
Ms. Christie L. Girouard
Ms. Lucille Glenn
Ms. Barbara D. Goodman
Mr. James Gourlay & Ms. Lea Havas
Ms. Alisa Grishman
Mr. Gerald Groff
Ms. Elise Hahl
Mr. Jim Hall
Ms. Jill Haltigan
Mr. & Mrs. Dan Halulko
Mr. Michael Hamilton
Mr. Bob Hansen
Mr. Paul E. Hatalsky
Mr. & Mrs. Shannon Hazzard
Mr. & Mrs. Robert W. Herbert
Mr. & Mrs. Jeffrey Herold
Ms. Ellen Hicinbothem
Ms. Maggie Holder
Mr. & Mrs. Eric Hough
Ms. Joan M. Hughes
Mr. Andrew W. Huntley, II
Mr. Kristopher Hupp
Mr. & Mrs. Thomas Iorio
Mr. Jack Faith
Ms. Margaret Janco
Mr. Sean D. Johnson
Mr. & Mrs. Dave Johnston
Ms. Stephanie M. Jozefowicz
Ms. Gale D. Kaufmann
Mr. & Mrs. Jonathon Keller
Mr. & Mrs. Sean Keller
Mr. David Keller
Mr. Peter N. Keller
Dr. & Mrs. William H. Kipp
Mr. & Mrs. Stanley J. Kirkavitch
Mr. Alex Kiselica
Ms. Theresa Kisha & Mr. Bill Sullivan
Ms. Lisa F. Kristian
Ms. Debra Lam
Mr. Randall Larson
Ms. Sandra Lash
Mr. John R. Leichliter
Ms. Carolyn S. Ludwig
Mr. Michael A. Macchiarolo
Mr. Douglas Mackay
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Ms. Bernadette Palumbo
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Mr. & Mrs. Daniel S. Pettigrew
Mr. & Mrs. Paul D. Pindroh, Sr.
Mr. Scott Pirc
Mr. Robert C. Plumb
Ms. Kimberlee Rackley
Mrs. Katy Rank Lev
Mr. Bill Roerink
Mr. Robert J. Rogers
Mr. James & Mrs. Linda Roney
Ms. Aviva Rosenberg
Mr. William Rosenberger, Jr.
Ms. Alyssa Ruberto
Mr. James Rudolph
Mr. & Mrs. Richard Rush
Ms. Debra L. Sackett
Susan & Bill Sadler
Mr. Justin A. Santi
Mr. & Mrs. Rob Scalzo
Mr. & Mrs. Bob Schad
Ms. Eileen Schilken
Mr. Glenn Schmid
Mr. James G. Schultz
Mr. Arthur J. Schwab
Ms. Jenifer Schweitzer
Mr. & Mrs. Francis Sehn
Ms. Rebecca Senkowicz
Mr. Jim Serene
Ms. Nancy Shannon
Mr. John Shaw
Miss Anna Sholties
Ms. Annette Sirio
Ms. Robin Sirlouis
Ms. Martha L. Skarlinski
Mr. & Mrs. Eric Smiga
Mr. Bernard M. Smilak
Ms. Rose M. Smith
Ms. Michelle K. Smith
Ms. Diane Spirer
Ms. Della Sproat
Mr. Thomas Steimer
Ms. Malori Stevenson
Ms. Mary Stock
Mr. & Mrs. Ronald Strompie
Mr. John Stuart
Ms. Maryann G. Sullivan
Mr. Brian Sullivan
Ms. Deborah A. Tatro
Mr. Jesse Taylor
Ms. Kaitlyn Thoma
Ms. Lee Thornberry
Ms. Noreen Tompkins
Ms. Sarah Treadway
Mr. Chad A. Underkoffler, Jr.
Mr. Kevin Vaughan & Ms. Jennifer Schnakenberg
Ms. Andrea Vaughn
Mr. David Wellington
Ms. Amy C. Williams & Mr. Robert Slammon
Mr. & Mrs. George Williams
Ms. Adrianna Wilshire
Mr. & Mrs. Albert Wilson
Ms. Susan Wyble
Linda & Ken Yonek
Mr. & Mrs. Jonathan Young
Mr. Dan Zalewski
Lynn Zeidan
Ms. Donna Zeno
Ms. Jennifer Zimmerman
Mr. Craig & Mrs. Molly Zoladz
Mr. Dale Zubik & Ms. GeorgeAnn Held
Mr. & Mrs. Christopher Zulka

MEADOWCROFT ROCKSHELTER AND HISTORIC VILLAGE

Record Crowds Flock to American Indian Heritage Weekend

More than 1,700 visitors enjoyed a first-hand look at the everyday lives of 16th and 18th century American Indians earlier this fall at Meadowcroft's sixth annual American Indian Heritage Weekend.

Re-enactors explained the prehistoric and colonial era skills used by American Indians, including hunting, fur trading, cooking, weaving, hide tanning, and tool-making.

A variety of re-enactors demonstrated traditional American Indian skills and brought Meadowcroft's 16th century Indian Village to life. Visitors participated in presentations in the 1770s Frontier Indian cabin and enjoyed the opportunity to throw the atlatl, a prehistoric spear thrower.

Meadowcroft, a National Historic Landmark located in Avella, Pa. in Washington County, is closed for the winter and will reopen on May 2, 2015. For more information, please visit **www.heinzhistorycenter.org** and click on the Meadowcroft tab or call 724-587-3412.

Celebrate 40 Years of Steelers' Championships

In honor of the 40th anniversary of the Steelers' first championship in Super Bowl IX, the Western Pennsylvania Sports Museum invites fans to enjoy a number of artifacts commemorating the Super Steelers teams of the 1970s, including Franco Harris' Super Bowl IX championship ring, a display honoring all four members of the vaunted Steel Curtain defensive line, and information about the Steelers' legendary 1974 draft that yielded four future Hall of Famers.

History Center Partners with Smithsonian to Honor Local Jazz Tradition

As part of the event, local historians Dan Holland and Dr. Nelson Harrison will discuss Pittsburgh's pivotal role in shaping this musical genre alongside short films, jazz music, and a special Music Innovation Lab with City Music Center.

Saturday, Nov. 1, 2014
10:30 a.m. – 2 p.m.

Enjoy a celebration of Pittsburgh's jazz legacy during a special event held in collaboration with the Smithsonian Institution's Lemelson Center for the Study of Invention and MCG Jazz. Visitors will be able to compose music with a special music innovation lab of iPads and modular synthesizers by Pittsburgh jazz artists. The program is free with regular museum admission. For more information, please contact Kate Lukaszewicz at 412-454-6314 or kalukaszewicz@heinzhistorycenter.org.

Golf Tournament wins for Sports Museum

The Mascaro Construction team and Olympic ice hockey silver medalist Brianne McLaughlin, drove, chipped, and putted their way to victory at the Celebrity Golf Tournament, which supports educational programming for adults and children. To reserve a spot at next year's tournament on Sept. 21, 2015, please contact Angela Ford at 412-454-6405 or agford@heinzhistorycenter.org

The History Center's 11th Annual Celebrity Golf Tournament, recently held at the historic Allegheny Country Club, featured more than 100 golfers who helped raise $60,000 to support the Western Pennsylvania Sports Museum. This year's tournament featured a lineup of celebrity golfers, including Matt Bahr, Craig Bingham, Rocky Bleier, Sid Bream, Jack Ham, Guy Junker, Pierre Larouche, Carol Semple Thompson, and Mike Wagner. The Celebrity Golf Tournament was co-chaired by Arnold Palmer, Steve Blass, Jerry MacCleary, Carol Semple Thompson, and Mike Wagner.

Bocce Tourney Scores for Italian American Program

Tom Higgins, Dan Onorato, Sen. Wayne Fontana, and Sen. Matt Smith were among the guests at the Fifth Annual Bocce Tournament. Tournament winners JENNMAR Bolts generously donated a portion of their prize money back to the History Center to support the Italian American Program.

The Fifth Annual Bocce Tournament and Festival featured 36 competing teams and drew more attendees than any previous year. Chaired by Jack Mascaro of Mascaro Construction Co., the tournament raised more than $140,000 for the History Center's Italian American Program.

Attendees enjoyed delicious Italian fare courtesy of The Common Plea and DeLallo and live entertainment by Pure Gold and Jimmy Sapienza's Five Guys Named Moe. A variety of elected officials, including Mayor Bill Peduto, County Executive Rich Fitzgerald, and Sen. Jay Costa attended the event to support the History Center and test their bocce skills.

All in the Family: Italian Heritage Day

PHOTOGRAPH BY VIVIANA ALTIERI OF MONDO ITALIANO

An Italian American bazaar celebrated italianità with entertainment, vendors, and local Italian heritage groups at the inaugural Italian Heritage Day.

Hundreds of local families enjoyed a fun and educational event at the History Center's inaugural Italian Heritage Day earlier this fall.

Interactive activities designed for the entire family to enjoy together filled six floors of the museum and featured traditional Italian American foods, Italian vocabulary, bocce, and genealogy programming. Thanks to the generous sponsorship of **Mascaro Construction**, admission for all children ages 17 and under was free for this special event.

For more information on the Italian American Program, please contact Melissa Marinaro at 412-454-6426 or memarinaro@heinzhistorycenter.org.

1879 Dinner to Honor Founders' Circle Members

History Center President and CEO Andy Masich pictured with Emeritus Trustee Sigo Falk.

Friday, Nov. 21, 2014 • 6 p.m.

The History Center's annual 1879 Founders' Circle Dinner, hosted by **David and Wendy Barensfeld** and the **Compton Family**, will honor members of the 1879 Founders' Circle, which provides vital support to help preserve the region's rich history and continue to inspire future generations.

This year's 1879 Founders' Circle Dinner is set for Friday, Nov. 21, at 6 p.m. and will feature a sneak peek of the History Center's new Sigo Falk Collections Center and visible storage area (see page 2).

For more information about the 1879 Founders' Circle, please contact Angela Ford at 412-454-6405 or agford@heinzhistorycenter.org.

New Library & Archives Accessions

Joseph Arcuri: Pigeon racing.
Thomas Arnone: Souvenir program KDKA fourteenth anniversary.
Joe Bathanti: East Liberty.
Tim Breslin: Lakemont Park.
Brian Cohen: Marcellus Shale documentary project.
Anthony DeCaria: The table my mother set.
Field gather: Early life of the Pennsylvania Germans.
Field gather: Glass Frog Identifier v. 8-9.
Rebekah Johnston: Zion Evengelical Lutheran Church diamond anniversary.
Kathleen Kenna: L'Indien (Indiana High School) 1925.
Pittsburgh History and Landmarks: Pittsburgh Architecture.
Pittsburgh Penguins: Mario Lemieux the best there ever was.

Rochelle Blumenfeld: Rochelle Blumenfeld Oral History.
Congregation Emanu-El Israel: Congregation Emanu-El Israel, Greensburg, Pa, Records.
Roberta Egelston: Heimann Family Photographs.
Family of Isadore "Fred" Dupin: Jack and Patty (Dupin) Dominick and Fred and Bev Dupin: Brooks-Dupin Family Papers and Photographs.
Roy A. Hunt Foundation: Roy A. Hunt Foundation Records.
Colette Lemmon: Lewis Dairy Company Photograph.
Richard Miros: Lock Gates for Panama Canal, Manhole and Manhole Covers for Watertight Frames, Sketch No. 201-207.
Joe Palko: H.J. Heinz Company Men's 57 Club Membership Card.
Pittsburgh Film Office: Pittsburgh Film Office Photographs.
Joanne Uffner Rodgers: Photograph of President Franklin Delano Roosevelt in Pittsburgh.
Norman and Karl Voigt: Voigt-Sinemus Family Collection.
Charles B. Yaskanich, Jr.: Charles B. Yaskanich, Jr. Collection of Westinghouse Materials.

New Museum Collections

Francis A. Berry: Collection of sports uniforms.
John F. Bitzer Jr.: A painting titled "Farmhand with Horses," by John W. Beatty.
Clem Blazewick: St. Casimir High School letterman jacket and graduation ribbon from 1962.
Dorothy Drake Brooks: Oil painting by James Bonar depicting a river scene in Pittsburgh.
Martin Farrell: Pennsylvania Railroad cream cup, sugar bowl, and saucer.
Michael Haraburda: Gulf Research slide rule.
Joan and Steve Isack: Contents of the Ilkuvitz Clothing Store in Clairton, Pa.
Cheryl Kevish: Several pieces of Kopp and McKee glass.
Robert Kruszewski: Television repair equipment documenting Charles J. Kruszewski's side job as a television and radio repairman.
Mary Lamica: 1964 Corning Christmas Party Bowl.
Douglas Lucas: Glass mold for Electrolier shade.
Metropolitan Baptist Church: Commemorative plate from the Metropolitan Baptist Church in the North Side.
Marjorie Mitchell: A collection of awards documenting the donor's bowling career.
Burton Morris: A painting by the donor titled "Earth Tree."
John Novak: St. Canice trophy.
Beverly Pollock: Cash drawer and stool from Pollock's Department Store in Gallitzin and "Jews with AIDS in the family" pin.
James B. Richardson III: Collection of dug artifacts.
Art Rooney Jr.: Collection of sport prints and posters.
Judy Rubinstein: A plate from Temple B'nai Israel and two pins from the Soviet Jewry movement.
Dolores Sippos: A collection of outfits, head gear, and accompanying accessories worn by members of the Fraternal Order of the Daughters of Pocahontas.
Donna Thompson: Sweater worn by donor's father, Harvey George Thompson, while attending the University of Pittsburgh in the mid-1920s.
Marya Pendro Thomson: Collection of the Pendro family.
Gary Vogelsberger: Runner's up trophy.
Molly Walton: Collection of Mellon family hats and clothing items.
Estate of Dorothy Wells: Photograph of Edwin M. Stanton, c. 1865.

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HISTORY CENTER
IN ASSOCIATION WITH THE SMITHSONIAN INSTITUTION

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Making History is the newsletter of the Senator John Heinz History Center. Associates of the History Center include the Western Pennsylvania Sports Museum, the Thomas & Katherine Detre Library & Archives, Meadowcroft Rockshelter and Historic Village, and Fort Pitt Museum. The History Center operates legally as the Historical Society of Western Pennsylvania. The History Center is an affiliate of the Smithsonian Institution and funded in part by the Allegheny Regional Asset District and the Pennsylvania Historical and Museum Commission.

Phone: 412-454-6000 • Fax: 412-454-6031
www.heinzhistorycenter.org

Ned Schano, Director of Communications
Brady Smith, Senior Communications Manager
Rachellynn Schoen, Senior Graphic Design Manager
Sarah Reck, Web & Social Media Content Manager
Breanna Smith, Communications Assistant

RAD works here

1974

Each Thursday, the History Center shares a historic image of Pittsburgh and Western Pennsylvania via Facebook and Instagram, like the photograph above.

#ThrowbackThursday

Celebrate Pittsburgh's rich and beautiful past on Facebook and Instagram each week during #ThrowbackThursday. Throwback Thursday, better known as #TBT, is a global online movement where social media users post images from the past. The History Center shares historic and iconic images of Pittsburgh and Western Pennsylvania every Thursday that are sure to make you nostalgic.

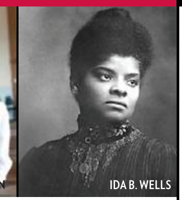
See more historic images by liking the Heinz History Center on Facebook – **facebook.com/SenatorJohnHeinzHistoryCenter** – and by following us on Instagram – **@historycenter**.

Calendar of Events

MARTIN DELANY RE-ENACTOR

STUDENT MUSICIANS

CONSERVATOR ANTJE NEUMANN


IDA B. WELLS

Places of Invention: Pittsburgh Jazz Innovation
Saturday, Nov. 1, 2014 • 10:30 a.m. – 2 p.m.
See page 7 for details.

Insider Tour of Meadowcroft Rockshelter with Dr. James Adovasio
Sunday, Nov. 2, 2014 • 1 p.m.
Visit **www.heinzhistorycenter.org**.

A World on Fire: Western Pa. as Battleground
Thursday, Nov. 6, 2014 • 5 – 8:30 p.m.
See page 6 for details.

Saturday Speaker Series: Ellwood City Ledger Historic Images
Saturday, Nov. 11, 2014 • 11 a.m. – 1 p.m.
Visit **www.heinzhistorycenter.org**.

Hop into History
Wednesday, Nov. 12, 2014
10:30 – 11:15 a.m.
Visit **www.heinzhistorycenter.org**.

From Slavery to Freedom Film Series: Ida B. Wells
Wednesday, Nov. 19, 2014 • 5:30 p.m.
Visit **www.heinzhistorycenter.org**.

1879 Founders' Circle Dinner
Saturday, Nov. 21, 2014 • 6 p.m.
See page 7 for details.

Family Archives Workshop: Part II
Saturday, Nov. 22, 2014
10 a.m. – 12:30 p.m.
See page 2 for details.

Pearl Harbor Memories
Saturday, Dec. 6, 2014 • Noon
See page 3 for details.

Hop into History
Wednesday, Dec. 10, 2014
10:30 – 11:15 a.m.
Visit **www.heinzhistorycenter.org**.

Holiday Heritage Workshop
Thursday, Dec. 11, 2014
6:30 – 7:30 p.m.
See page 2 for details.

Healthy Heritage Cooking: Seven Fishes
Saturday, Dec. 13, 2014 • Noon
Visit **www.heinzhistorycenter.org**.

Exhibitions

FIRST FLOOR
NEW! Pittsburgh's Lost Steamboat: Treasures of the Arabia (through Jan. 4, 2015)
UPMC SmartSteps
Senator John Heinz: A Western Pennsylvania Legacy
Kidsburgh (mezzanine)
Vintage Vehicles

SECOND FLOOR
Pittsburgh: A Tradition of Innovation
Western Pennsylvania Sports Museum

THIRD FLOOR
Western Pennsylvania Sports Museum
Discovery Place
Rediscovering Lewis & Clark: A Journey with the Rooney Family
Prine Collection of Woodworking Planes
Outdoor Advertising

FOURTH FLOOR
NEW! Heinz
NEW! From Slavery to Freedom
NEW! The Post-Gazette Photographers: Best of 2013
NEW! Thornton Oakley's Pittsburgh
Glass: Shattering Notions
Sigo Falk Collections Center

FIFTH FLOOR
Clash of Empires: The British, French, & Indian War, 1754-1763

SIXTH FLOOR
Wrought Metal Treasures from the Blum Collection

Please visit our website at **www.heinzhistorycenter.org** for a complete list of upcoming events and detailed exhibition information.

EXHIBIT B

HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA
Pittsburgh, Pennsylvania

Financial Statements
For the years ended June 30, 2019 and 2018

and Independent Auditors' Report Thereon

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Big Thinking. Personal Focus.

INDEPENDENT AUDITORS' REPORT

To the Board of Trustees
Historical Society of Western Pennsylvania
Pittsburgh, Pennsylvania

We have audited the accompanying financial statements of the Historical Society of Western Pennsylvania (History Center), which comprise the statements of financial position as of June 30, 2019 and 2018, and the related statements of activities, changes in net assets, functional expenses and cash flows for the years then ended, and the related notes to the financial statements.

Management's Responsibility for the Financial Statements
Management is responsible for the preparation and fair presentation of these financial statements in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditors' Responsibility
Our responsibility is to express an opinion on these financial statements based on our audits. We conducted our audits in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion
In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the History Center as of June 30, 2019 and 2018, and the changes in its net assets and its cash flows for the years then ended in accordance with accounting principles generally accepted in the United States of America.

Schneider Downs & Co., Inc.

Pittsburgh, Pennsylvania
October 25, 2019

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HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA

STATEMENTS OF FINANCIAL POSITION

	June 30 2019	June 30 2018
ASSETS		
CURRENT ASSETS		
Cash and cash equivalents - unrestricted	$ 127,259	$ 205,494
Cash and cash equivalents - restricted	827,924	838,193
	955,183	1,043,687
Grants and pledges receivable	5,709,762	2,157,068
Other receivables	109,038	142,800
Prepaid expenses and other current assets	43,843	169,358
Inventory	297,443	182,327
Total Current Assets	7,115,269	3,695,240
LONG-TERM ASSETS		
Investments	25,989,642	23,697,681
Grants and pledges receivable, net	937,796	1,328,954
Property and equipment, net	29,323,706	29,806,137
Total Assets	$ 63,366,413	$ 58,528,012
LIABILITIES AND NET ASSETS		
CURRENT LIABILITIES		
Revolving credit loan	$ 1,000,000	$ 500,000
Accounts payable	634,015	495,011
Accrued liabilities	246,923	367,032
Deferred revenue	33,424	28,970
Current portion of long-term debt	300,000	300,000
Total Current Liabilities	2,214,362	1,691,013
LONG-TERM DEBT	535,000	835,000
GIFT ANNUITY LIABILITY	198,321	212,004
DEFERRED COMPENSATION LIABILITY	71,847	21,508
Total Liabilities	3,019,530	2,759,525
NET ASSETS		
Without donor restrictions	26,713,753	26,611,090
With donor restrictions	33,633,130	29,157,397
Total Net Assets	60,346,883	55,768,487
Total Liabilities And Net Assets	$ 63,366,413	$ 58,528,012

See notes to financial statements.

HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA

STATEMENTS OF ACTIVITIES
FOR THE YEARS ENDED JUNE 30, 2019 AND 2018

	2019	2018
CHANGES IN NET ASSETS WITHOUT DONOR RESTRICTIONS		
Revenue:		
Gifts and grants	$ 4,579,011	$ 2,677,317
Admissions	1,743,954	1,277,459
Membership dues	482,618	354,483
Event rentals and commissions	897,033	1,154,406
Museum shop and café sales	873,102	576,753
Rental income	80,428	90,064
Resource revenue	267,390	464,446
In-kind contributions	513,787	592,377
Other income	180,988	233,293
Total Revenue	9,618,311	7,420,598
Net assets released from restrictions	4,176,355	5,617,428
Total Revenue And Gains	13,794,666	13,038,026
Operating expenses:		
Program services	11,035,618	9,603,870
Management and general	1,696,217	1,603,423
Fundraising	960,168	841,905
Total Operating Expenses	13,692,003	12,049,198
Increase In Net Assets Without Donor Restrictions	102,663	988,828
CHANGES IN NET ASSETS WITH DONOR RESTRICTIONS		
Gifts and grants	1,851,002	3,773,774
Contributions for endowment	6,350,234	391,498
Net investment return	450,852	1,681,956
Net assets released from restrictions	(4,176,355)	(5,617,428)
Increase In Net Assets With Donor Restrictions	4,475,733	229,800
Increase In Net Assets	$ 4,578,396	$ 1,218,628

See notes to financial statements.

HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA

STATEMENTS OF CHANGES IN NET ASSETS
FOR THE YEARS ENDED JUNE 30, 2019 AND 2018

	Without Donor Restrictions	With Donor Restrictions	Total
BALANCE, June 30, 2017	$ 25,622,262	$ 28,927,597	$ 54,549,859
2018 Increase in net assets	988,828	229,800	1,218,628
BALANCE, June 30, 2018	26,611,090	29,157,397	55,768,487
2019 Increase in net assets	102,663	4,475,733	4,578,396
BALANCE, June 30, 2019	$ 26,713,753	$ 33,633,130	$ 60,346,883

See notes to financial statements.

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HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA

STATEMENTS OF FUNCTIONAL EXPENSES
FOR THE YEARS ENDED JUNE 30, 2019 AND 2018

	2019			
	Program Services			
	History Center	Meadowcroft	Fort Pitt	Total
Salaries and benefits	$ 4,175,692	$ 266,127	$ 287,797	$ 4,729,616
Occupancy	1,398,128	68,473	39,955	1,506,556
Programs, exhibits and collections	2,064,897	41,201	95,001	2,201,099
Marketing	445,676	83,991	14,321	543,988
Professional fees and administration	277,611	7,454	10,084	295,149
Other fees	283,855	713	-	284,568
Equipment	33,672	117	1,843	35,632
Depreciation	1,296,226	134,930	7,854	1,439,010
Total	$ 9,975,757	$ 603,006	$ 456,855	$ 11,035,618

	2018			
	Program Services			
	History Center	Meadowcroft	Fort Pitt	Total
Salaries and benefits	$ 3,756,759	$ 265,946	$ 254,104	$ 4,276,809
Occupancy	1,422,775	67,998	42,009	1,532,782
Programs, exhibits and collections	1,153,025	64,761	94,473	1,312,259
Marketing	399,499	55,489	10,693	465,681
Professional fees and administration	232,469	9,786	3,988	246,243
Other fees	261,002	328	-	261,330
Equipment	65,484	358	2,714	68,556
Depreciation	1,291,585	133,836	14,789	1,440,210
Total	$ 8,582,598	$ 598,502	$ 422,770	$ 9,603,870

2019		
Management and General	Fundraising	Total Expenses
$ 1,058,328	$ 383,035	$ 6,170,979
118,933	2,661	1,628,150
39,664	537,899	2,778,662
3,475	3,822	551,285
268,253	30,110	593,512
1,959	-	286,527
205,605	2,641	243,878
-	-	1,439,010
$ 1,696,217	$ 960,168	$ 13,692,003

2018		
Management and General	Fundraising	Total Expenses
$ 1,065,708	$ 327,918	$ 5,670,435
118,994	2,408	1,654,184
30,489	496,704	1,839,452
2,798	150	468,629
246,127	13,060	505,430
2,022	-	263,352
137,285	1,665	207,506
-	-	1,440,210
$ 1,603,423	$ 841,905	$ 12,049,198

See notes to financial statements.

HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA

STATEMENTS OF CASH FLOWS
FOR THE YEARS ENDED JUNE 30, 2019 AND 2018

	2019	2018
CASH FLOWS FROM OPERATING ACTIVITIES		
Increase in net assets	$ 4,578,396	$ 1,218,628
Adjustments to reconcile increase in net assets to net cash used in operating activities:		
Net investment return	(450,852)	(1,681,956)
Depreciation	1,439,010	1,440,210
Contributions to endowment	(6,350,234)	(391,498)
Proceeds from sales of donated stock for operations	286,713	395,222
Changes in assets and liabilities:		
Grants and pledges receivable	(161,536)	(1,778,686)
Prepaid expenses, other current assets and other receivables	159,277	(150,404)
Inventory	(115,116)	(31,445)
Accounts payable and accrued liabilities	18,895	206,745
Deferred compensation liability	50,339	21,508
Deferred revenue and gift annuity liability	(9,229)	(21,678)
Net Cash Used In Operating Activities	(554,337)	(773,354)
NET CASH FLOWS FROM INVESTING ACTIVITIES		
Purchase of property and equipment	(956,579)	(979,448)
Purchases of investments	(3,758,091)	(779,705)
Proceeds from sales or maturity of investments	1,630,269	1,613,391
Net Cash Used In Investing Activities	(3,084,401)	(145,762)
CASH FLOWS FROM FINANCING ACTIVITIES		
Principal payments on long-term debt	(300,000)	(311,666)
Borrowings on revolving credit loan	1,250,000	500,000
Payments on revolving credit loan	(750,000)	(710,000)
Proceeds from sales of donated stock for restricted purposes	-	20,822
Proceeds from contributions restricted for endowment	3,350,234	411,498
Net Cash Provided By (Used In) Financing Activities	3,550,234	(89,346)
Decrease In Cash And Cash Equivalents	(88,504)	(1,008,462)
CASH AND CASH EQUIVALENTS		
Beginning of year	1,043,687	2,052,149
End of year	$ 955,183	$ 1,043,687
SUPPLEMENTAL DISCLOSURE OF CASH FLOW INFORMATION		
Cash paid during the year for interest	$ 78,000	$ 72,000

See notes to financial statements.

NOTE 1 - ORGANIZATION

The Historical Society of Western Pennsylvania (History Center), founded in 1879, operating as the Senator John Heinz History Center, which includes the Detre Library and Archives and the Western Pennsylvania Sports Museum, the Fort Pitt Museum (Fort Pitt), and the Meadowcroft Rockshelter and Historic Village, is a Pennsylvania not-for-profit educational institution that engages and inspires large and diverse audiences through programs that enable links to the past, understanding in the present, and guidance for the future by preserving regional history and presenting the American experience with a Western Pennsylvania connection. This work is accomplished in partnership with others through archaeology, archives, artifact collections, broadcast and electronic media, civic engagement, conservation, educational programs, exhibitions, events, library, museums, public outreach, performance, preservation, publications, products, research, technical assistance, and virtual programs. In addition, the History Center is a strategic partner with the Smithsonian Institution as an affiliate member. This contractual relationship enables the History Center to gain greater access to Smithsonian collections, exhibits and programs.

The History Center entered into a 10-year agreement with the Commonwealth of Pennsylvania effective April 22, 2010 whereby the History Center is responsible for the management and operations of Fort Pitt. In consideration for the services provided by the History Center, the History Center has the right to retain all revenues generated from operation of Fort Pitt during the agreement's term. The agreement will automatically renew for successive one-year periods.

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

A summary of significant accounting policies consistently applied by management in the preparation of the accompanying financial statements follows:

Use of Estimates - The preparation of financial statements in conformity with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

Basis of Presentation - The financial statements of the History Center have been prepared on the accrual basis of accounting. Net assets and revenues, expenses and gains and losses are classified based on the existence or absence of donor-imposed restrictions. Accordingly, net assets of the History Center and changes therein are classified and reported as follows:

> Net Assets Without Donor Restrictions - Net assets that are not subject to donor-imposed restrictions.
>
> Net Assets With Donor Restrictions - Net assets subject to donor-imposed restrictions that may or will be met either by actions of the History Center and/or passage of time, or that are to be maintained in perpetuity by the History Center. Generally, the donors of these assets that are to be maintained in perpetuity permit the History Center to use all or part of the income earned on related investments for general or specific purposes.

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)

Cash and Cash Equivalents - The History Center considers all highly liquid investments with maturities of three months or less at the time of purchase to be cash equivalents. The History Center maintains cash and cash equivalents at a financial institution that may exceed federally insured amounts at times. Restricted cash consists of donor-designated funds that are to be utilized for specific projects.

Investments - Investments in equity securities with readily determinable fair values and all investments in debt securities are reported at fair value, with realized and unrealized gains and losses included in the statements of activities. Investments received by gift are recorded at market value on the date of donation. Investment securities, in general, are exposed to various risks such as interest rate, credit and overall market volatility. Due to the level of risk associated with certain investment securities, changes in values of investment securities will occur in the near term, and it is reasonably possible that such changes could materially affect the amounts reported in the statements of financial position.

Alternative investments, which are not readily marketable, are carried at net asset value (NAV) as provided by the investment managers. NAV is assessed by management to approximate fair value. The History Center reviews and evaluates the values and agrees with the valuation methods and assumptions used in determining the fair value of the alternative investments. Those estimated fair values might differ significantly from the values that would have been used had a ready market for these securities existed. Such investments are, by their nature, generally considered to be long-term investments and are not intended to be liquidated on a short-term basis.

Net investment return is reported in the statements of activities and consists of interest and dividend income, realized and unrealized gains and losses, less external investment expenses.

Grants and Pledges Receivable - Unconditional promises to give cash and other assets to the History Center are reported at their estimated fair value at the date the promise is received. Unconditional promises to give that are expected to be collected in future years are recorded at the present value of estimated future cash flows. The discounts on those amounts are computed using a risk-free interest rate applicable to the year in which the promise is received. Amortization of the discount is included in contribution revenue. Grants receivable include amounts due from federal and state agencies and are recorded in accordance with the terms of the contracts. Conditional promises to give are not included as support until such time as the conditions are substantially met. During the year ended June 30, 2018, the History Center received a conditional grant for $150,000 that was not included as support because the conditions were not met as of June 30, 2018. The conditions were met and revenue was recognized during the year ended June 30, 2019.

The History Center's policy is to provide for future losses on uncollectible grants and pledges based on an evaluation of the underlying grants and pledges and such other factors that, in the History Center's judgment, merit consideration in estimating doubtful accounts. At June 30, 2019 and 2018, no allowance was considered to be necessary.

Inventory - Gift shop inventory is stated at the lower of cost or net realizable value.

Property and Equipment - Property and equipment are recorded at cost when purchased. Property and equipment received by gift are recorded at fair value on the date of donation. The History Center records depreciation of property and equipment using the straight-line method over the estimated useful lives, ranging from five years to 40 years, of the related assets.

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)

Impairment of Long-Lived Assets and Long-Lived Assets to Be Disposed Of - In accordance with the provisions of the Property, Plant and Equipment topic of the Financial Accounting Standards Board (FASB) Accounting Standards Codification (Codification), long-lived assets are reviewed for impairment whenever events or changes in circumstances indicate that the carrying amount of an asset may not be recoverable. Recoverability of assets to be held and used is measured by a comparison of the carrying amount of an asset to future undiscounted cash flows expected to be generated by the asset. If such assets are considered to be impaired, the impairment to be recognized is measured by the amount by which the carrying amount of the asset exceeds the fair value, as defined, of the assets. No impairment was recorded for fiscal years ended June 30, 2019 and 2018.

Exhibits and Collections - The History Center's collections include its collection of material on Western Pennsylvania history. These items are held for educational, scientific and curatorial purposes. Each of the items is cataloged, preserved and cared for, and activities verifying their existence and assessing their condition are performed continuously.

The collections, which were acquired through contributions and purchases since the History Center's inception, are not recognized as assets in the statements of financial position. Purchases of collection items are recorded as operating expenditures in the year in which the items are acquired. Contributed collection items are not reflected in the financial statements. Proceeds from deaccessions or insurance recoveries are reflected as increases in the statements of activities and changes in net assets with donor restrictions and are used for the acquisition of collections.

Gift Annuity Liability - Revenues and receivables from gift annuities are recognized upon the completion of these contracts and are reported at the present value of the estimated future cash flows with restrictions based on the donors' intent of the future use of the funds. Payments are made to donors or other beneficiaries in accordance with the respective agreements.

The History Center reports gifts of property and equipment as revenue without donor restrictions unless explicit donor stipulations specify how the donated assets must be used. Gifts of long-lived assets with explicit restrictions that specify how the assets are to be used and gifts of cash or other assets that must be used to acquire long-lived assets are reported as revenue with donor restrictions. In the absence of explicit donor stipulations about how long those long-lived assets must be maintained, the History Center reports the expirations of the donor restrictions when the donated or acquired long-lived assets are placed in service.

Contributed Services - Certain individuals and companies have made contributions of products and services to develop the History Center's programs and assist in its support. To the extent quantifiable by the contributor of goods or services, management recorded the value of goods and services provided as contribution revenue and related expense in the accompanying statements of activities. As of June 30, 2019 and 2018, such total value provided by contributors was approximately $262,000 and $292,000, respectively, of which the History Center received approximately $214,000 and $236,000 of contributed advertising services during the fiscal years ended June 30, 2019 and 2018, respectively, from a company of which a Board of Trustees (Board) member is a member of management. (See Note 6 regarding contributed rent.)

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)

Revenue Recognition - The History Center recognizes revenue within the following categories:

Contributions - The History Center reports gifts of cash and other assets as restricted support if they are received with donor stipulations that limit the use of the donated assets. When a donor restriction expires, that is, when a stipulated time restriction ends or the purpose of the restriction is accomplished, net assets with donor restrictions are reclassified to net assets without donor restrictions and are reported in the statements of activities as net assets released from restrictions.

Membership - Membership gifts are reflected as revenue on the accompanying financial statements when received.

Event Rentals and Commissions - The History Center rents portions of its facility for historic life events, corporate events and other functions. When food and beverages are provided by its outside caterer, a commission is paid to the History Center. Event rentals and commissions revenues are recorded in the period the services are rendered.

Rental Income - The 2011 purchase and subsequent renovation of a nine-story building on Penn Avenue provides museum-quality storage for the History Center's collections as well as providing a source of rental income from similar institutions needing artifact storage. Rental income is recorded on a monthly basis over the terms of the rental agreements.

Resource Revenue - The History Center entered into an agreement allowing drilling on approximately 275 acres of property it owns in Washington County. As of June 30, 2019 and 2018, 177 acres are included in drilling plots, with royalties paid based on gas production of the wells. In 2018, the History Center entered into another lease for 20 acres of property in Allegheny County on which the History Center was granted mineral and gas rights. A sign-on bonus of $80,000 was awarded to the History Center upon signing the lease. During the year ended June 30, 2019, drilling began on the Allegheny County property. Resource revenue is recorded when received.

Income Taxes - The History Center is exempt from federal income tax under Section 501(c)(3) of the U.S. Internal Revenue Code (IRC). Accordingly, no federal or state income taxes have been provided.

The History Center follows the Income Taxes topic of the Codification that requires a recognition threshold and measurement principles for financial statement disclosures of tax positions taken or expected to be taken on a tax return. The History Center has assessed the tax positions it has taken or expects to take in its tax returns and, as a result, no liability for uncertain tax positions has been recorded; further, the History Center has no unrecognized tax benefits. The History Center is no longer subject to examination of its tax returns for years before 2016.

Advertising - Expenditures for advertising are charged to expense the first time the advertising takes place.

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)

Recent Accounting Pronouncements - The FASB has issued Accounting Standards Update (ASU) No. 2014-09 Revenue from Contracts with Customers (Topic 606) (ASU 2014-09), which is the result of a joint project of FASB and the International Accounting Standards Board (IASB) to clarify the principles for recognizing revenue and to develop a common revenue standard for use in the U.S. and internationally. ASU 2014-09 supersedes the revenue recognition requirements in Topic 605 of the FASB Codification and most industry-specific guidance throughout the Industry Topics of the Codification. ASU 2014-09 enhances comparability of revenue recognition practices across entities, industries, jurisdictions and capital markets, reduces the number of requirements an entity must consider for recognizing revenue, and requires improved disclosures to help users of financial statements better understand the nature, amount, timing and uncertainty of revenue that is recognized. In August 2015, the FASB issued ASU 2015-14, a deferral on the implementation date, and this guidance is effective for annual reporting periods beginning after December 15, 2018. ASU 2014-09 requires either retrospective application by restating each prior period presented in the financial statements, or retrospective application by recording the cumulative effect on prior reporting periods to beginning retained earnings in the year that the standard becomes effective. The History Center is assessing the impact that ASU 2014-09 will have on its financial statements and related disclosures.

In July 2015, the FASB issued ASU No. 2015-11 - Inventory - Simplifying the Measurement of Inventory (Topic 330) (ASU 2015-11), which currently requires an entity to measure inventory as the lower of cost or market. Market could be replacement cost, net realizable value or net realizable value less an approximately normal profit margin. These amendments require entities to measure inventory at the lower of cost or net realizable value. Net realizable value is the estimated selling price in the ordinary course of business, less reasonably predictable cost of completion, disposal and transportation. The amendments in ASU 2015-11 are effective for financial statements issued for fiscal years beginning after December 15, 2017. Early adoption is permitted. The History Center adopted this ASU for the year ended June 30, 2019. There was no impact to the accompanying financial statements upon adoption.

The FASB issued ASU No. 2016-02 Leases (Topic 842) (ASU 2016-02), which is the result of a joint project of FASB and IASB to increase transparency and comparability among organizations by recognizing lease assets and lease liabilities on the balance sheet and disclosing key information about leasing arrangements. ASU 2016-02 amends Topic 842 to require a lessee to recognize a liability to make lease payments (lease liability) and a right-of-use asset representing its right to use the underlying asset for the lease term initially measured at the present value of the lease payments. The lessee should also include payments to be made on an optional lease extension if the organization is reasonably certain that the extension will be exercised when measuring the asset and liability. Organizations will be permitted to make an accounting policy election to not recognize leases with a term of 12 months or less. ASU 2016-02 is effective for annual reporting periods beginning after December 15, 2019. Early application is permitted. The History Center is assessing the impact that ASU 2016-02 will have on its financial statements and related disclosures.

In June 2018, the FASB issued ASU 2018-08 Not-for-Profit Entities (Topic 958) (ASU 2018-08), which clarifies and improves the scope and accounting guidance for contributions received and contributions made. The amendments in ASU 2018-08 assists entities in (1) evaluating whether transactions should be accounted for as contributions (nonreciprocal transactions) within the scope of Topic 958 or as exchange (reciprocal) transactions subject to other guidance and (2) determining whether a contribution is conditional. This ASU requires either retrospective application by restating each prior period presented in the financial statements, or retrospective application by recording the cumulative effect on prior reporting periods to beginning net assets in the year the standard becomes effective. ASU 2018-08 is effective for fiscal years beginning after December 15, 2018, with early adoption permitted. The History Center is currently evaluating the impact that ASU 2018-08 will have on its financial statements and related disclosures.

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)

In August 2018, the FASB issued ASU 2018-13, Fair Value Measurement - Disclosure Framework (Topic 820). The updated guidance improves the disclosure requirements on fair value measurements and is effective for fiscal years, and interim periods within those fiscal years, beginning after December 15, 2019. Early adoption is permitted. The History Center is assessing the impact that ASU 2018-13 will have on its financial statements and related disclosures.

In March 2019, the FASB issued ASU 2019-03 Not-for-Profit Entities (Topic 958), which modifies the definition of the term collections and require that a collection-holding entity disclose its policy for the use of proceeds from when collection items are removed from a collection. ASU 2019-09 requires prospective application and is effective for fiscal years beginning after December 15, 2019, with early adoption permitted. The History Center is currently evaluating the impact that ASU 2019-03 will have on its financial statements and related disclosures.

NOTE 3 - FINANCIAL ASSETS AND LIQUIDITY RESERVES

The History Center's cash flows have seasonal variations during the year attributable to timing of exhibits, admissions, contributions, memberships and event rentals. To manage liquidity, the History Center maintains a line of credit that is drawn upon as needed. In addition, expenditures are managed to match the seasonal variation in cash flows.

At June 30, 2019 and 2018, financial assets available for general expenditure, that is, without donor or other restrictions limiting their use, within one year, comprise the following:

	2019	2018
Cash and cash equivalents - unrestricted	$ 127,259	$ 205,494
Grants and pledges receivable	1,303,982	905,788
Other receivables	109,038	142,800
Endowment spending appropriation	1,087,240	1,183,587
Total financial assets available within one year	$ 2,627,519	$ 2,437,669

The History Center is supported by contributions with and without donor restrictions. Because a donor's restriction requires resources to be used in a particular manner, or in a future period, the History Center must maintain sufficient resources to meet those responsibilities to its donors. As part of the History Center's liquidity management, it has a policy to segregate restricted cash and equivalents to be available as expenditures and other obligations become due. The History Center has a revolving credit loan with $-0- and $250,000 of availability it could draw in the event of a liquidity need as of June 30, 2019 and 2018, respectively.

The History Center's endowment funds consist of donor-restricted endowments. Income from donor-restricted endowments is restricted for specific purposes with the exception of the spending appropriation available for general use. The History Center's endowment funds are subject to a board-elected spending rate between 2% and 7%. This percentage is applied to a 36-month average market value of the investments at the prior year-end as described in Note 8.

HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA

NOTES TO FINANCIAL STATEMENTS
JUNE 30, 2019 AND 2018

NOTE 4 - GRANTS AND PLEDGES RECEIVABLE

The majority of the History Center's grants and pledges receivable are due from state and local governments, corporations and private foundations. Pledges receivable include approximately $344,000 and $110,000 from Board members as of June 30, 2019 and 2018, respectively.

Scheduled collections of grants and pledges receivable, net of unamortized discount (2% in 2019 and 2018) are as follows:

	2019	2018
In one year or less	$ 5,709,762	$ 2,157,068
Between one year and five years	919,481	1,330,000
More than five years	100,000	100,000
	6,729,243	3,587,068
Less - Unamortized discount	81,685	101,046
	$ 6,647,558	$ 3,486,022

NOTE 5 - INVESTMENTS AND FAIR VALUE MEASUREMENT

Investments, at fair value, at June 30 consist of the following:

	2019	2018
Cash and cash equivalents	$ 3,670,268	$ 804,760
U.S. government obligations	1,657,680	1,518,435
U.S. corporate obligations	1,043,545	1,057,370
International corporate obligations	292,176	276,275
Marketable equity securities	8,010,867	8,483,722
International equity securities	6,829,846	6,984,541
Real asset funds	3,217,961	3,407,284
Fixed-income mutual fund	1,267,299	1,165,294
	$ 25,989,642	$ 23,697,681

The History Center follows the Codification topic Fair Value Measurement, which defines fair value, establishes a framework for its measurement and expands disclosures about fair value measurement

NOTE 5 - INVESTMENTS AND FAIR VALUE MEASUREMENT (Continued)

This topic defines fair value as the price that would be received to sell an asset or paid to transfer a liability (i.e., exit price) in an orderly transaction between market participants at the measurement date. This topic requires disclosures that categorize assets and liabilities measured at fair value into three different levels, depending on the assumptions (i.e., inputs) used in the valuation. Level 1 provides the most reliable measure of fair value, while Level 3 generally requires significant management judgment. Financial assets and liabilities are classified in their entirety based on the lowest level of input significant to the fair value measurement. The fair value hierarchy is defined as follows:

Level 1 - Valuations are based on unadjusted quoted prices in an active market for identical assets or liabilities.

Level 2 - Valuations are based on quoted prices for similar assets or liabilities in active markets, or quoted prices in markets that are not active for which significant inputs are observable, either directly or indirectly.

Level 3 - Valuations are based on prices or valuation techniques that require inputs that are both unobservable and significant to the overall fair value measurement. Inputs reflect management's best estimate of what market participants would use in valuing the asset or liability at the measurement date.

The valuation of the History Center's investments according to the fair value hierarchy as of June 30 is as follows:

	2019			
	Level 1	Level 2	Level 3	Total
Cash and cash equivalents	$ 3,670,268	-	-	$ 3,670,268
U.S. government obligations	-	$ 1,657,680	-	1,657,680
U.S. corporate obligations	-	1,043,545	-	1,043,545
International corporate obligations	-	292,176	-	292,176
Marketable equity securities	8,010,867	-	-	8,010,867
International equity obligations	6,829,846	-	-	6,829,846
Real asset funds	1,661,982	-	-	1,661,982
Fixed-income mutual fund	1,267,299	-	-	1,267,299
Total assets in the fair value hierarchy	$ 24,440,262	$ 2,993,401	-	24,433,663
Investments measured at net asset value (a)				1,555,979
Total investments at fair value				$ 25,989,642

HISTORICAL SOCIETY OF WESTERN PENNSYLVANIA

NOTES TO FINANCIAL STATEMENTS
JUNE 30, 2019 AND 2018

NOTE 5 - INVESTMENTS AND FAIR VALUE MEASUREMENT (Continued)

	2018			
	Level 1	Level 2	Level 3	Total
Cash and cash equivalents	$ 804,760	-	-	$ 804,760
U.S. government obligations	-	$ 1,518,435	-	1,518,435
U.S. corporate obligations	-	1,057,370	-	1,057,370
International corporate obligations	-	276,275	-	276,275
Marketable equity securities	8,483,722	-	-	8,483,722
International equity obligations	6,984,541	-	-	6,984,541
Real asset funds	2,041,188	-	-	2,041,188
Fixed-income mutual fund	1,165,294	-	-	1,165,294
Total assets in the fair value hierarchy	$ 19,479,505	$ 2,852,080	-	22,331,585
Investments measured at net asset value (a)				1,366,096
Total investments at fair value				$ 23,697,681

(a) In accordance with Subtopic 820-10, certain investments were measured at NAV per share (or its equivalent) and have not been classified in the fair value hierarchy. The fair value amounts presented in the table above are intended to permit reconciliation of the fair value hierarchy to the line items presented in the statements of financial position.

The valuation of the History Center's investments in real asset funds that are valued at NAV as a practical expedient requires significant judgment due to the absence of quoted market prices and inherent lack of liquidity. These investments consist of a commodity fund and Real Estate Investment Trust (REIT). The History Center's investments in the commodity funds and REIT are valued using NAV per share or unit of interest. The objective of the commodity fund is to exceed the performance of the Bloomberg Commodity Index Total Return by taking long and short positions in the commodities markets. The primary investment objective of the REIT is to maximize total return. Used as a practical expedient for the estimated fair value, NAV per share or its equivalent is provided by the fund manager and reviewed by the History Center.

The History Center invests in real asset funds to provide a hedge against unexpected inflation, to capture unique sources of returns and to provide diversification benefits. Real asset fund manager performance is typically reported monthly though underlying assets may be valued less frequently.

The following table summarizes investments measured at fair value based on NAV per share as a practical expedient as of June 30:

	Category	Fair Value	Unfunded Commitments	Redemption Frequency	Redemption Notice Period
2019	Real asset funds	$ 1,555,979	-	Monthly	1 day
2018	Real asset funds	$ 1,366,096	-	Monthly	1 day

NOTE 6 - PROPERTY AND EQUIPMENT

Property and equipment at June 30 consist of the following:

	2019	2018
Building	$ 55,280,760	$ 54,414,851
Furniture, fixtures and equipment	5,046,522	4,987,120
Vehicles	33,256	33,256
	60,360,538	59,435,227
Less - Accumulated depreciation	31,207,452	29,768,442
	29,153,086	29,666,785
Construction in progress	170,620	139,352
	$ 29,323,706	$ 29,806,137

In 1991, the History Center executed a lease agreement with the Sports and Exhibition Authority for its primary facility. The lease was for an initial term of 25 years and provides for renewal options for three additional 25-year periods. The lease was renewed in September 2015 for another 25-year period commencing October 22, 2016. Rental payments under the lease agreement are $1 per year. The History Center has recorded an in-kind contribution and rent expense of approximately $324,000 for the years ended June 30, 2019 and 2018 for the lease. The History Center is responsible for all operating costs and repairs and maintenance, including taxes, assessments, water and sewer rents and all other governmental charges or levies.

NOTE 7 - BORROWING ARRANGEMENTS

Borrowings at June 30 consist of the following:

	2019	2018
Term loan	$ 775,000	$ 1,075,000
Revolving credit loan	1,000,000	500,000
Economic development agency loan	60,000	60,000
	1,835,000	1,635,000
Less - Current portion of borrowings	1,300,000	800,000
	$ 535,000	$ 835,000

The History Center has a Loan and Security Agreement (Agreement) with a bank, comprised of a term loan and a revolving credit loan. The Agreement is secured by any and all revenues, and substantially all assets of the History Center.

The term loan permits maximum borrowings of $1,500,000 and has a maturity date of January 31, 2022. Principal payments of $25,000 are due monthly. Interest is charged at the London InterBank Offered Rate (LIBOR) (2.40% at June 30, 2019) plus 2.50%.

NOTE 7 - BORROWING ARRANGEMENTS (Continued)

The revolving credit loan permits maximum borrowings of $1,000,000 and has a maturity date of January 31, 2020. Interest is charged at LIBOR (2.40% at June 30, 2019) plus 2.25%.

Borrowings under the Agreement require the History Center to meet certain nonfinancial and financial covenants, with which the History Center was in compliance at June 30, 2019.

In October 2014, the History Center entered into a $60,000 interest-free loan agreement with an economic development agency for physical improvements to the façade of a building. Principal payments on the loan agreement shall be deferred, and no interest shall be charged or accrued until such time as the building is sold or transferred. The loan is secured by a third lien position perfected security interest in the building.

A summary of the principal payments due for the fiscal years ending June 30 is as follows:

Fiscal Year Ending June 30		Amount
2020	$	300,000
2021		300,000
2022		175,000
Thereafter		60,000
	$	835,000

NOTE 8 - ENDOWMENT

The History Center's endowment consists of various investment funds established primarily for support of the organization's mission. Its endowment includes donor-restricted endowment funds. As required by generally accepted accounting principles, net assets associated with endowment funds are classified and reported based on the existence or absence of donor-imposed restrictions.

Interpretation of Relevant Law - The History Center has elected to be governed by the Commonwealth of Pennsylvania's Act 141 (Act 141), which permits election of a total return policy that allows a nonprofit to choose to treat a percentage of the average market value of the endowment's donor-restricted investments as income each year. However, the long-term preservation of the real value of the assets must be taken into consideration when the History Center elects the amount. In accordance with Act 141, the spending rate elected must be between 2% and 7%. This percentage is applied to a 36-month average market value of the investments at the prior year-end. The History Center used a spending rate of 6.9% and 7% for the years ended June 30, 2019 and 2018, respectively. The History Center classifies as donor-restricted net assets the original value of gifts donated to be maintained in perpetuity. Earnings on these gifts are accumulated in net assets with donor restrictions. As required by Act 141, the History Center has adopted a written investment policy, of which a section specifically relates to the endowment fund.

NOTE 8 - ENDOWMENT (Continued)

The History Center considers the following factors in making a determination to set a spending rate:

1. Protecting the corpus of the endowment fund.
2. Preserving the spending power of the assets.
3. Obtaining maximum investment return with reasonable risk and operational consideration.
4. Complying with applicable laws.

The following represents the change in donor-restricted endowment investments for the years ended June 30:

	Total
Endowment net assets, June 30, 2017	
Beginning of year	$ 23,106,932
Investment return:	
Investment income	446,909
Net realized gain	273,956
Net unrealized appreciation	961,091
Contributions	384,382
Appropriation of endowment assets for expenditures	(1,118,125)
Appropriation of endowment assets for term loan repayment	(375,464)
Balance as of June 30, 2018	23,697,681
Investment return:	
Investment income	528,282
Net realized gain	583,156
Net unrealized depreciation	(660,586)
Contributions	3,277,191
Appropriation of endowment assets for expenditures	(1,088,587)
Appropriation of endowment assets for term loan repayment	(352,495)
Endowment net assets, June 30, 2019	$ 25,989,642

Return Objectives and Risk Parameters - The History Center has adopted investment and spending policies for endowment assets that attempt to provide a reasonable level of funding to programs supported by its endowment while seeking to enhance the purchasing power of the fund's corpus by striving for long-term growth. Endowment assets include those assets of donor-restricted funds that the History Center must hold in perpetuity or for a donor-specified period. Under this policy, as approved by the Board, the endowment assets are invested in a manner that is intended to produce results that exceed the price.

NOTE 8 - ENDOWMENT (Continued)

Strategies Employed for Achieving Objectives - To satisfy its long-term rate-of-return objectives, the History Center relies on a total return strategy in which investment returns are achieved through both capital appreciation (realized and unrealized) and current yield (interest and dividends). The History Center targets a diversified asset allocation to achieve its long-term return objectives within prudent risk constraints. Investment advisors, at the discretion of the Investment Committee of the Board, are given guidelines to the percentage that can be committed to a particular investment or investment category.

Spending Policy and Investment Objectives Related to Spending Policy - In accordance with Act 141, the History Center considers interest and dividend income and realized and unrealized gains from net assets with donor restrictions as amounts that must be added to net assets with donor restrictions until such time as the Board allocates such amounts for spending. The Board's practice is to allocate 5% of the market value of the investments after the expenses of managing the endowment for spending. Beginning in 2006, the Board approved an additional 2% draw, when donor terms permit, for the specific purpose of repaying the term loan outstanding. In 2019 and 2018, the spendable return totaled approximately $1,436,000 and $1,476,000, respectively. The amount is recognized as net assets released from restrictions in the statements of activities. This practice occurs if such total incomes in the current year or accumulated in prior years are sufficient to allow the Board-authorized distribution. When such gains are allocated for spending, the related net assets are released from restriction.

From time to time, certain donor-restricted endowment funds may have fair values less than the amount required to be maintained by donors or by the law (underwater endowments). The History Center has interpreted Act 141 to permit spending from underwater endowments in accordance with prudent measures required under law. At June 30, 2019, invested funds with original gift values of $28,152,074, fair values of $25,989,642 and deficiencies of $2,162,432 were reported in net assets with donor restrictions. At June 30, 2018, funds with original gift values of $24,874,883, fair values of $23,697,681, and deficiencies of $1,177,202 were reported in net assets with donor restrictions.

The History Center believes that this spending policy is consistent with the Commonwealth of Pennsylvania's guidelines and with the History Center's objective to maintain the purchasing power of the endowment assets held in perpetuity, as well as to provide additional real growth through new gifts and investment return.

NOTE 9 - NET ASSETS WITH DONOR RESTRICTIONS

Net assets with donor restrictions at June 30 are available for the following purposes:

	2018	Additions	Expenditures	2019
Research and educational programs	$ 5,459,716	$ 1,641,589	$ 2,530,860	$ 4,570,445
Fort Pitt operations	-	209,413	209,413	-
Endowment funds*	23,697,681	6,801,086	1,436,082	29,062,685
	$ 29,157,397	$ 8,652,088	$ 4,176,355	$ 33,633,130

NOTE 9 - NET ASSETS WITH DONOR RESTRICTIONS (Continued)

	2017	Additions	Expenditures	2018
Research and educational programs	$ 5,820,665	$ 3,757,957	$ 4,118,906	$ 5,459,716
Fort Pitt operations	-	22,933	22,933	-
Endowment funds*	23,106,932	2,066,338	1,475,589	23,697,681
	$ 28,927,597	$ 5,847,228	$ 5,617,428	$ 29,157,397

* Endowment funds including outstanding pledges receivable and assets restricted in perpetuity to investments, the income of which is generally expendable to support programs/exhibits/publications and/or general support of the History Center, the Hillman Gallery, Italian-American history, and the From Slavery to Freedom Exhibit.

NOTE 10 - BENEFIT PLANS

Effective January 1, 2018, the History Center entered into a deferred compensation agreement with one of its key executives. The agreement states that the executive shall receive a lump sum of $250,000 upon completing five years of service commencing January 1, 2018 and ending December 31, 2022. In accordance the FASB Topic 720, the cost of the deferred compensation is accrued over the course of the participant's service. Compensation expense incurred relating to this contract was approximately $50,000 and $22,000 for the years ended June 30, 2019 and 2018, respectively.

The History Center sponsors a defined contribution retirement plan established in accordance with Section 403(b) of the IRC covering all eligible employees. The History Center matches up to 3% of eligible employees' compensation. Total expense to the History Center was approximately $69,000 and $67,000 for the years ended June 30, 2019 and 2018, respectively.

NOTE 11 - RELATED-PARTY TRANSACTIONS

The History Center engages in transactions in the normal course of business with companies whose executives are members of the Board. The History Center's conflict-of-interest policy requires that all potential conflicts be disclosed and that the interested person does not participate in the final decision and does not vote on this issue.

Additionally, certain members of the Board have made unconditional promises to give to the History Center. (See Note 4.)

NOTE 11 - RELATED-PARTY TRANSACTIONS (Continued)

During the year ended June 30, 2017, a not-for-profit organization of which a member of History Center management is a Board member funded the History Center's purchase of property and land for $1,317,500. Following this transaction, the History Center began receiving quarterly distributions from the organization to maintain and preserve the property. The History Center received distributions in the amount of approximately $15,000 and $14,000 during the years ended June 30, 2019 and 2018, respectively. This separate entity's operations are funded by the aforementioned not-for-profit organization of which a member of History Center management is a Board member and a qualified terminable interest property trust.

During the years ended June 30, 2019 and 2018, respectively, a member of the Board funded approximately $244,000 and $65,000 of demolition costs for a building located on property owned by the History Center.

The History Center is one of 15 designated institutions named as beneficiaries of The Dietrich Foundation (the Foundation) created by William S. Dietrich II pursuant to an Amended and Restated Declaration of Trust dated August 23, 2011. The Foundation is expected to make annual distributions that will be allocated among the prespecified supported organizations. As of June 30, 2019, the History Center's distribution share was approximately 1%. The distributions to the History Center have been recorded as gifts and grants with donor restrictions and held in the endowment fund. Distributions of approximately $267,000 and $239,000 were received in fiscal years 2019 and 2018, respectively.

NOTE 12 - FUNCTIONAL EXPENSES

Expenses are summarized and categorized based upon their functional classification as either program or supporting expenses. Specific expenses are readily identifiable to a single program or activity are charged directly to that function. Certain categories of expenses are attributable to more than one program or supporting function and are allocated on a reasonable basis that is consistently applied. The expenses that are allocated include salaries and benefits, marketing, and professional fees and administration, which are allocated on the basis of time and effort.

NOTE 13 - SUBSEQUENT EVENTS

Management has evaluated subsequent events through October 25, 2019, the date on which the financial statements were available to be issued.

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Howard Hanna chairman announced as new board chair of Heinz History Center

JESSE HUBA | Wednesday, October 28, 2020 1:57 p.m.

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COURTESY OF SENATOR JOHN HEINZ HISTORY CENTER

Howard W. "Hoddy" Hanna III, chairman of Howard Hanna Real Estate Services, was unanimously approved as the new chair of the Heinz History Center's board of trustees.

Howard W. "Hoddy" Hanna III, chairman of Howard Hanna Real Estate Services, was unanimously approved recently as the new chair of the Senator John Heinz History Center's board of trustees.

Hanna III of Fox Chapel will succeed Diane P. Holder, president and CEO at UPMC Health Plan, and executive vice president at UPMC. Holder has served as chair of the Heinz History Center since 2016.

"The Heinz History Center is one of the great cultural assets in our region," Hanna said. "I am honored to have the opportunity to chair the board of this remarkable jewel of the community."

Hanna, whose business is the largest family-owned real estate company in the United States, will be the 53rd regional leader on the history center's board.

"'Hoddy' is universally respected as a community leader. He loves Pittsburgh and is a terrific ambassador. 'Hoddy' also brings a lifetime of knowledge of the people, organizations and resources that can help the History Center fulfill its educational mission while reflecting regional pride," said Andy Masich, president and CEO of the Heinz History Center.

Hanna joined the history center's board of trustees in 2018. Since then, he has contributed in many ways to the its success.

"Since coming on board, he has demonstrated his leadership as a donor, matchmaker and creative thinker," Masich said. "We will soon announce that 'Hoddy' and Howard Hanna Real Estate Services will make it possible for kids to come to the history center for free during the month of November to see our latest exhibition, Smithsonian's Portraits of Pittsburgh, and enjoy the Very Merry Pittsburgh holiday experience in our first floor Great Hall."

After attaining his real estate license at 18 years old and following in his father's footsteps, Hanna began his real estate career as a weekend sales associate for Howard Hanna while he attended college in Cleveland, Ohio, at John Carroll University.

Under his guidance, Howard Hanna expanded and diversified. He became an important influence in the real estate community and an industry leader.

He also chairs the Children's Hospital of Pittsburgh Board of Trustees. In addition, he is a member of the hospital's foundation board as well as boards of RBS Citizen's Financial Group, John Carroll University, LaRoche College, the University of Pittsburgh Katz Graduate School of Business Board of Visitors, the Diocese of Pittsburgh Finance Council and the YMCA of Greater Pittsburgh.

Hanna and the History Center's board of trustees' initial focuses are on securing the organization's long-term financial stability, expanding the museum's digital capabilities to reach broader audiences and acting on the museum's commitment to diversity, equity, inclusion and accessibility.

"Hoddy's experience, enthusiasm and business acumen will be tremendous assets to our family of museums, especially as we navigate through the pandemic," Masich said. "Under his leadership, we'll remain committed to preserving and interpreting Western Pennsylvania history to better understand the present and make plans for the future."

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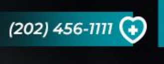

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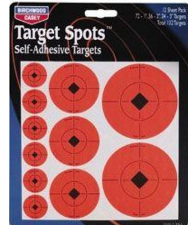

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Don Rebel | Tuesday, Nov. 10, 2020 | High School Sports Network

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After several weeks of very few changes, the Trib HSSN state rankings underwent a major facelift heading into the state quarterfinal round. Nine teams saw their dreams of state gold and their prized spot in the state Top 5 vanish. Most of the teams lost on the field in district or state playoff action. However, District 11 Nazareth in Class 6A had to forfeit its game last week because of covid-19 related issues. Hopefully, with ...
(https://tribhssn.triblive.com/trib-hssn-state-football-rankings-for-nov-10-2020/?utm_source=triblive&utm_medium=display&utm_campaign=mesearch_bottom_widget) (https://tribhssn.triblive.com/trib-hssn-state-football-rankings-for-nov-10-2020/?utm_source=triblive&utm_medium=display&utm_campaign=mesearch_bottom_widget) *Continue reading »*

NFL approves proposals for minority hires, covid-19 playoff contingency plan

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Associated Press | Tuesday, Nov. 10, 2020 | TribLive

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NFL owners approved a proposal that will reward organizations for developing minority coaches and front office executives who become head coaches, general managers or team presidents for other clubs. Also, the leagues owners unanimously approved a contingency plan to expand the playoff field to 16 teams if meaningful games are canceled because of covid-19. The voting was held Tuesday during a virtual meeting with NFL commissioner Roger Goodell and league executives. Teams that lose a ...
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Trump loyalists get top Pentagon jobs after Esper firing

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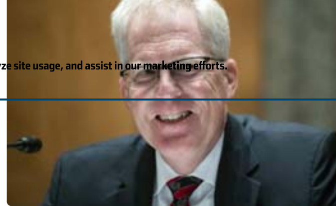

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WASHINGTON A day after President Donald Trump fired Defense Secretary Mark Esper, three staunch loyalists to the president were named to top defense jobs. Among them was a former Fox News commentator who failed to get through Senate confirmation because of offensive remarks he made, including about Islam. The abrupt changes sent reverberations through the Pentagon as nervous civilian and military personnel waited for the next shoe to drop. And they fueled worries of a ...
(https://triblive.com/news/politics-election/trump-loyalists-get-top-pentagon-jobs-after-esper-firing/?utm_source=triblive&utm_medium=display&utm_campaign=mesearch_bottom_widget) (https://triblive.com/news/politics-election/trump-loyalists-get-top-pentagon-jobs-after-esper-firing/?utm_source=triblive&utm_medium=display&utm_campaign=mesearch_bottom_widget) *Continue reading »*

GCC girls soccer in great shape heading into state playoffs

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Bill Beckner Jr. | Tuesday, Nov. 10, 2020 | High School Sports Network

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When Olivia Kruger took over the girls soccer team at Greensburg Central Catholic, she wanted to "change the shape of the Lady Centurions attack. Stylistically, they went to a 4-5-1 set. "A lot of things were already in place, Kruger said. "I have been very lucky that way, and we have so much talent. I just wanted to change up the shape and work more out of the midfield. With that slight tweak also came ...
(https://tribhssn.triblive.com/gcc-girls-soccer-in-great-shape-heading-into-state-playoffs/?utm_source=triblive&utm_medium=display&utm_campaign=mesearch_bottom_widget) (https://tribhssn.triblive.com/gcc-girls-soccer-in-great-shape-heading-into-state-playoffs/?utm_source=triblive&utm_medium=display&utm_campaign=mesearch_bottom_widget) *Continue reading »*

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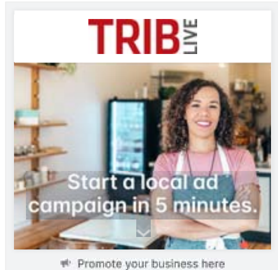

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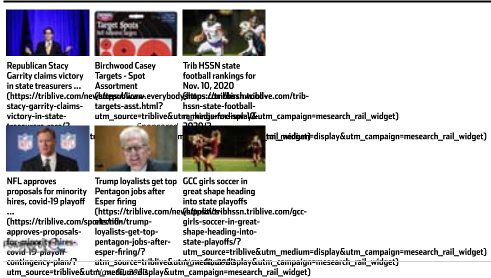

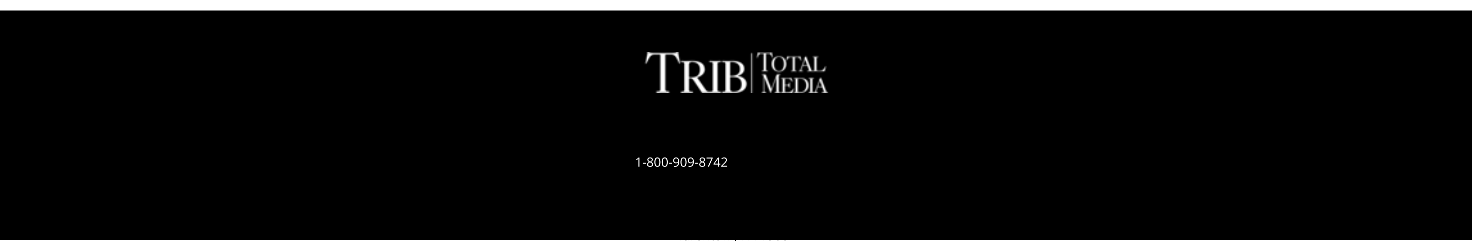

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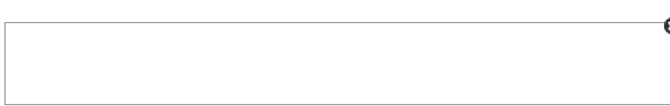

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EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

Criminal No. 09-0048
ELECTRONICALLY FILED

YOUA VUE,
Defendant.

MEMORANDUM OPINION AND ORDER RE: THE DISQUALIFICATION ISSUE IN THIS CASE; THE MOTIONS FOR DISQUALIFICATION FILED BY THE OFFICE OF THE FEDERAL PUBLIC DEFENDER IN 21 UNRELATED CRIMINAL CASES; AND THE GOVERNMENT'S MOTIONS FOR RECONSIDERATION IN THE 21 UNRELATED CRIMINAL CASES AND THE AUTOMATIC DISQUALIFICATION IN FUTURE OFPD'S CASES

I. Introduction

A. Overview of Disqualification Issues

Because of this Court's rulings denying defense counsel's Motions to Withdraw as court-appointed counsel for Mr. Youa Vue, and certain on the record remarks by the Court in the Vue proceedings and in an unrelated case, United States v. Marvin Hall, 08cr0215, the Office of the Federal Public Defender for the Western District of Pennsylvania (hereinafter "OFPD") embarked upon an extraordinary, probably unprecedented (certainly unprecedented in the Western District of Pennsylvania) campaign to disqualify this Judge from presiding over every criminal proceeding in which the OFPD has been appointed by this Court, pursuant to the CJA, the implementing plan of the Board of Judges, and the Federal and Local Rules of Criminal Procedure, to represent a defendant. There is one conspicuous exception, however -- the Vue case.

Relying almost exclusively on rulings and comments made in the Vue case, and to a lesser extent statements made in the Marvin Hall case, and attaching transcripts made and documents presented in the Vue case, the OFPD filed Motions for Disqualification of this Court in 21 unrelated cases where a defendant is represented by a court-appointed Assistant Federal Public Defender ("AFPD"). The basis for disqualification stated in each of the Motions for Disqualification is the OFPD's perceived bias or lack of impartiality towards its attorneys – not towards any criminal defendant represented by the OFPD, however – based on this Court's rulings and statements in the Vue case. Yet, despite its perception of bias and lack of impartiality in Vue, the OFPD has not filed a Motion for Disqualification in Vue, even though Mr. Vue faces up to ten years imprisonment and will be sentenced by this Court on September 22, 2010.

Although the parties in the Vue case have stipulated to an advisory guidelines sentencing range of imprisonment of 15 to 21 months; although this Court is not bound by the stipulation and has the authority to sentence Mr. Vue up to the statutory maximum of ten years imprisonment; and although Mr. Vue has already served about 16 months in pretrial detention, the OFPD is content to have this Court stand in judgment and render sentence on Mr. Vue, despite its perception of this Court's bias and lack of impartiality based upon rulings and statements made in the Vue case. Necessarily, whatever bias or lack of impartiality the OFPD perceives towards its attorneys, the OFPD does not perceive any bias or lack of impartiality against Mr. Vue. If it did, defense counsel could not, in good conscience and in the exercise of sound professional judgment, refrain from filing a Motion for Disqualification to seek to prevent this Court from rendering final judgment on Mr. Vue.

After careful consideration of the 21 Motions for Disqualification, and accompanying Motions to Continue or Stay Proceedings filed in most but not all of the cases, this Court entered Preliminary Orders in the 21 affected cases which stated in part: "The Court will grant any pending Motion to Disqualify, if and when it is established on the record that this request is the personal request of a defendant, as opposed to the desire of the [OFPD], and the Court will implement an automatic disqualification for all future criminal cases where a defendant is represented by an attorney" from the [OFPD].

After further consideration of the 21 Motions for Disqualification, the government's Motions for Reconsideration of the Preliminary Orders in the 21 cases, particularly the prophylactic "blanket disqualification" aspect, and the transcripts, documents and entire record in the Vue case; after due consideration of the various institutional, individual and public interests implicated by the highly unusual Motions for Disqualification of a sitting Judge of the United States District Court for the Western District of Pennsylvania in a broad category of current and future criminal proceedings involving the OFPD; and after conducting the necessary balancing of competing interests and consideration of the law on recusals and on a district court's obligations and discretion in considering a court-appointed attorney's request to withdraw from representation of a client; this Court finds no factual basis or legal authority that requires disqualification in the Vue case or any other case involving the OFPD.

That is, no reasonable observer, aware of all of the record facts and the context in which the Motions for Disqualification arose, would find any bias or lack of impartiality, or the appearance of any bias or lack of impartiality, toward the OFPD or any of the dedicated and professional Assistant Federal Public Defenders in that Office, let alone toward any of their

clients.

Nevertheless, the OFPD's extraordinary and unprecedented litigation efforts seeking to disqualify one district judge of a mid-sized federal district court from presiding in a broad category of current and future cases, calls for unusual measures to prevent what has real potential to disrupt the fair and orderly administration of justice (both criminal and civil) in the Western District of Pennsylvania. The disruptions would be magnified by the delays that would accompany the OFPD's appeals or petitions for mandamus, should this Court deny all 21 Motions for Disqualification; conversely, should this Court grant all 21 Motions for Disqualification and deny the government's 21 Motions for Reconsideration, the government would likely appeal or seek a writ of mandamus or prohibition from the Court's denials of its Motions.

Either way, the criminal and civil judicial system would be disrupted, and the affected defendants would remain in a legal holding pattern during the appeals. This Court is unwilling to risk the potential disruption and unnecessary delays imposed upon the litigants and attorneys who practice before the United States District Court for the Western District of Pennsylvania or to the Judges of the Court who administrate, manage, and preside over those cases.

Accordingly, although not required by the law of disqualification, 28 U.S.C. § 455, this Court finds that, in the paramount interests of fair and efficient administration of justice and fundamental fairness to the affected defendants, the Court should disqualify itself from most, but not all, of the 21 cases in which the Motions for Disqualification and the government's Motions for Reconsideration have been filed. For the same reasons, the Court will continue to preside over several cases that are well advanced in the litigation process. In those several cases, this

Court has actively participated in pretrial and trial proceedings, and is quite familiar with the facts and procedural histories therein – two (United States v. Cunningham, 07cr0298 and United States v. Clemons, 08cr0028) that are ready and were scheduled for sentencing following jury trials, one (the Vue case) that has entered a plea of guilty and is scheduled for sentencing, and one (United States v. Nance, 09cr193) in which an evidentiary, suppression hearing has been conducted and the Court has drafted an opinion and order after making the necessary credibility determinations.

Additionally, one of the 21 defendants represented by the OFPD has submitted a handwritten letter to the Court, filed on ECF docket at 09cr0254, United States v. Antwon Williams, objecting to the OFPD's Motion for Disqualification and requesting this Court to remain on his case. Because this contradicts the Affidavit submitted on his behalf by the AFPD appointed by the Court to represent Mr. Williams (Doc. No. 55-1 at 09cr0254), the Court will need to schedule a hearing on the Motion.

B. Synopsis of Procedural History

The disqualification issue cannot be decided in a vacuum. To that end, the Court has recounted in some detail in this Memorandum Opinion the facts and procedural history that are of record. However, a partial synopsis of the facts and most important procedural history might be helpful at this point, to assist in understanding the genesis of the Motions for Disqualification and Motions for Reconsideration.

- On March 4, 2009, a one count indictment was filed charging Mr. Vue with being a felon in possession of a shotgun in his residence on July 30, 2008. At his initial appearance on February 17, 2009, the OFPD was appointed by the Court pursuant to

18 U.S.C. § 3006A(b) and Rule 5 of the Local Rules of Criminal Procedure for the Western District of Pennsylvania, LCrR 5, and an Assistant Federal Public Defender was designated as primary counsel. See Order Appointing Federal Public Defender (Doc. No. 13).

- Mr. Vue absconded from the jurisdiction, was captured in Detroit, Michigan and returned to the Western District of Pennsylvania, and on May 21, 2009, this Court ordered that defendant be detained pending trial. (Doc. No. 22). He was formally arraigned on June 11, 2009, at which time the government handed her the mandatory Rule 16.1 disclosures, which included the search warrant, application and affidavit of probable cause for the July 30, 2008 search of Mr. Vue's residence which led to his arrest. (Docs. No. 27, 28)

- The AFPD investigated the charge for a year, during which the Court granted eight consecutive motions to enlarge the time to file pretrial motions from June 25, 2009 through June 10, 2010. On June 10, 2010, the AFPD filed a ninth motion to enlarge the time because "[c]ounsel needs additional time to complete the investigation of the facts and law before they can make an informed decision concerning the filing of pretrial motions." (Doc. No. 46). The Court denied that motion (Doc. No. 47), and entered a Pretrial Order scheduling jury selection and trial for July 26, 2010 (46 days later). (Doc. No. 48).

- After this Court granted a requested extension of time to file pretrial motions out of time, defendant filed a number of pretrial motions on June 11, 2010, including a

motion to suppress evidence and a motion to compel disclosure of the identity of a confidential informant. Five days later, the OFPD filed an Unopposed Motion to Withdraw As Counsel (Doc. No. 56) for Mr. Vue, alleging, without any details, that defense counsel learned on June 16, 2010, that the OFPD had represented the confidential informant at some unspecified point in time on some unspecified matter, and therefore it had an actual and potential conflict of interest. Although the informant was not a witness in the trial, the OFPD stated that "the credibility and reliability of the confidential informant is crucial to the defense of Mr. Vue's case." Nowhere in any of the OFPD's Motions and Memoranda in this case does the OFPD explain the manner in which the confidential informant is "crucial to the defense," and the record certainly does not support that claim.

- The Court denied, without prejudice, this and a subsequent Motion To Withdraw As Counsel, finding that no showing of an actual conflict or a serious potential for conflict had been shown or alleged, directed appointment of additional counsel to represent Mr. Vue to ameliorate any possible (albeit unlikely) conflict that might arise with regard to the confidential informant/former client, and thereafter denied the OFPD's Motions to Stay the proceedings pending a mandamus action and/or interlocutory appeal from the Court's pretrial orders to the United States Court of Appeals for the Third Circuit.

- On June 28, 2010, the OFPD filed its Notice of Appeal in the Third Circuit (Doc. No. 78), which is the prerogative of any advocate who disagrees with adverse rulings

by any district court. (Moreover, such an appeal is the way the legal system was designed. The District Court makes its rulings, the adversely affected party appeals, and the Court of Appeals reviews the record and arguments and decides if the rulings were right, wrong, or in between.) At this point, the OFPD obtained private counsel to appear in this Court to represent the OFPD and its institutional concerns.

- On or about July 8, 2010, having been appointed by the Court on June 26, 2010, additional counsel notified this Court that Mr. Vue intended to change his plea and plead guilty to the indictment, that he and the government had entered into a plea agreement with a stipulated sentencing guideline range of imprisonment, and that, because defendant's pretrial detention/incarceration was approaching the low end of the stipulated guideline range, defendant requested an expedited sentencing hearing and offered to waive the PSR. The Court scheduled a change of plea hearing for July 15, 2010, and following a colloquy, Mr. Vue's entry of a guilty plea, and legal argument, scheduled an expedited sentencing hearing for September 22, 2010.

- On August 17, 2010, the OFPD filed an Unopposed Motion to Dismiss the Appeal to the Third Circuit. The Motion to Dismiss set forth the OFPD's reason for dismissing the appeal, chiefly that "[a]lthough undersigned counsel intended to seek a stay of the district court proceedings in this Court to permit an interlocutory appeal and petition for mandamus, changed circumstances required counsel to reconsider whether to proceed. Specifically, between the time the Notice of Appeal was filed and the District Court's order denying the request to stay, the government offered to

resolve the matter pursuant to a plea agreement that stipulates an advisory guideline sentencing range of 15-21 months. . . . By that time, Mr. Vue already had served approximately 14 months in pretrial detention . . . . Accordingly, undersigned counsel concluded that seeking a stay in order to proceed with an appeal and/or a petition for mandamus would substantially harm Mr. Vue by delaying his ability to enter a guilty plea and promptly be sentenced and released . . . [in that] a stay of the district court proceedings would likely operate to Mr. Vue's detriment." Unopposed Motion to Dismiss, ¶¶ 7, 10.

- On August 31, 2010, the OFPD filed Motions for Disqualification in 21 other cases where an AFPD represents a defendant. This Court granted the Motions to Continue Proceedings filed in some but not all of the cases pending rulings on the Motions for Disqualification. The Court's Order, in part, stated that the Court would "grant any pending Motion to Disqualify, if and when it is established on the record that this request is the personal request of a defendant, as opposed to the desire of the [OFPD], and the Court will implement an automatic disqualification for all future criminal cases where a defendant is represented by an attorney from the [OFPD]." The government filed Motions to Reconsider those Orders and rescind the automatic "blanket disqualification' from OFPD cases.

II. Indictment and Arraignment

On February 4, 2009, the government filed a one count indictment against defendant, Youa Vue, charging that on or about July 30, 2008, Mr. Vue, a felon who had been convicted of conspiracy to manufacture a firearm in the United States District Court for the District of Minnesota in February, 1998, possessed a Model 500C, 20 gauge Mossberg shotgun in violation of 18 U.S.C. § 922(g)(1). Mr. Vue was arrested on July 30, 2008 by City of Pittsburgh Police Officers, including Detective Thomas Gault, who were executing a search warrant at his residence when they found, among other things, a modified shotgun (with the stock cut off and a pistol grip) in Mr. Vue's bedroom. As federal criminal prosecutions go, one could hardly imagine a more simple case.

After his initial appearance before United States Magistrate Judge Robert C. Mitchell on February 13, 2009, defendant indicated he was indigent and requested counsel be appointed by the Court. Defendant posted an unsecured appearance bond in the amount of $25,000, and Magistrate Judge Mitchell scheduled an arraignment hearing for February 18, 2009.

On February 17, 2009, United States Magistrate Judge Lisa Pupo Lenihan appointed the Office of the Federal Public Defender ("OFPD") as counsel, and listed the Assistant Federal Public Defender ("AFPD") who would be Mr. Vue's "primary counsel." Order of Court (Doc. No. 13). Also on February 17, 2009, the AFPD filed a motion to continue the arraignment because Mr. Vue had been admitted to Twin Lakes, a 28 day in-patient drug treatment facility in Somerset, Pennsylvania. Motion to Continue Arraignment Hearing (Doc. No. 14).

III. Defendant Absconds from Western District of Pennsylvania

Thereafter, defendant absconded from the District, whereabouts unknown, and this Court issued an arrest warrant on March 6, 2009. Defendant was arrested in Pittsburgh on May 13, 2009, by Deputy U.S. Marshals Derek Berger and Joe Moorehead of the Western Pennsylvania Fugitive Task Force. Defendant was wearing a hospital wristband from St. John's Hospital in Detroit, Michigan, where he apparently had checked himself in for substance abuse treatment. The name of his brother, Chia Vue, was on the wristband. When he was being transported in the Marshals' van for processing and initial appearance, Mr. Vue stated that "you guys didn't give me enough time to get to my AK," and that he had "guns all over the place." Transcript, Suppression Hearing, June 30, 2010 (Doc. No. 86), at 13.

On May 13, 2009, Magistrate Judge Mitchell conducted Mr. Vue's initial appearance on Pretrial Services' petition to revoke his bond, and ordered defendant held without bond pending a full revocation hearing. At the revocation of bond hearing on May 21, 2009, defendant admitted that he had absconded from the district after his discharge from the Twin Lakes treatment center in Somerset, and thereafter failed to report to his Pretrial Services Officer. Accordingly, this Court revoked his bond and ordered him detained pending trial. Order of May 21, 2009 (Doc. No. 22).

IV. The Confidential Informant

As set forth in defendant's Motion to Suppress Evidence, Or, In The Alternative, To Schedule Franks Hearing (Doc. No. 51), "[o]n July 29, 2008, Detective Thomas Gault of the City of Pittsburgh Police Bureau submitted an application for search warrant and authorization,

supported by an affidavit of probable cause . . . , to search the residence of 53 McKnight Street in Pittsburgh," which was granted on July 30, 2008. Defendant's Motion to Suppress (Doc. No. 51), at ¶ 2. Detective Gault's application for the search warrant included his affidavit of probable cause submitted in support thereof. Defendant's Motion to Suppress (Doc. No. 51), at ¶ 3 and Exhibit A (Doc. No. 51-1), at 2-4. According to the affidavit of probable cause, Detective Gault learned a great deal of information about Mr. Vue from a previously known and reliable Confidential Informant (CI), as is summarized in defendant's Motion to Suppress as follows:

> Detective Gault learned, within 48 hours of its [the Application's] submission, from "a proven reliable Confidential Informant [("CI")] that a man named Youa Vue possesse[d] a sawed off shotgun with filed off serial numbers" at the Residence . . . , that the CI had observed a shotgun at the Residence within 48 hours of the submission of the Application . . . , that there were other firearms in the Residence and that Mr. Vue had been convicted of prior firearms crimes; specifically, the CI told Detective Gault that Mr. Vue had served a federal prison term for making silencers. (Id.) Detective Gault explained that the CI alleged that Mr. Vue stated he made explosives and expressed interest in growing marijuana indoors. (Id.) According to Detective Gault, the CI stated that the CI had observed "equipment such as lighting and gardening tools used to grow marijuana inside [the Residence] within the last 48 hours" prior to submission of the Application. (Id.)

Motion to Suppress (Doc. No. 51) at ¶ 3.

V. June 11, 2009 - Local Criminal Rule 16.1 Disclosures

Defendant was formally arraigned on June 11, 2009 before Magistrate Judge Mitchell, at which time the AFPD received from the government the Local Criminal Rule 16.1 disclosures, including the "Police Report regarding search of residence and arrest of defendant." Receipt for Local Criminal Rule 16.1Material (Doc. No. 28). Detective Gault's application for the search

warrant and affidavit of probable cause, which set forth the above-quoted, detailed information gleaned from the CI, were attached to defendant's Motion to Suppress filed one year later, on June 12, 2010. Defendant's Motion to Suppress, Exhibit A (Doc. No. 51-1), pp. 2-10.[1]

Thus, on June 11, 2009, defense counsel had in her possession the application for the search warrant and affidavit of probable cause, which plainly states that there had been a person in defendant's residence between July 27, and July 29, 2008 who had engaged him in very detailed and specific conversation. As of June 11, 2009, therefore, counsel knew, or should have known, that a CI had been in defendant's residence between July 27, and July 29, 2008.

From the detailed descriptions of the CI's conversations with Mr. Vue at his residence between July 27, and July 29, 2008, Mr. Vue would likely have remembered the identity of the CI or disputed his presence. In any event, Mr. Vue's memory of the events described in the affidavit of probable cause was most likely sharper in June 2009, when the AFPD first received the affidavit, than a year later, in June 2010, when the AFPD filed a motion to suppress and for a Franks hearing, and a motion to reveal the identity of the CI.

VI. Repetitive (Nine) Motions for Enlargements of Time to File Pretrial Motions – June 25, 2009 through June 10, 2010

First Motion: On June 25, 2009, the assigned AFPD filed an unopposed motion to extend the time for filing pretrial motions from June 25, 2009 to August 24, 2009, on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 29), at ¶ 3. The Court

[1] In her motion for leave to file pretrial motions out of time, the AFPD stated that "[a]ccording to the discovery provided by the government, the firearm was seized during a search of Mr. Vue's home and pursuant to a search

granted the motion and enlarged the time as requested until August 24, 2009. (Doc. No. 30).

Second Motion: On August 25, 2009, the AFPD filed a second motion to enlarge the time to file pretrial motions on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 31), at ¶ 3. The Court granted the motion and enlarged the time as requested until October 9, 2009. (Doc. No. 32).

Third Motion: On October 9, 2009, the AFPD filed a third motion to enlarge the time to file pretrial motions on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 33), at ¶ 3. The Court granted the motion and enlarged the time as requested until November 9, 2009. (Doc. No. 34).

Fourth Motion: On November 9, 2009, the AFPD filed a fourth motion to enlarge the time to file pretrial motions on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 35), at ¶ 3. The Court granted the motion and enlarged the time as requested until December 31, 2009. (Doc. No. 36).

Fifth Motion: On December 31, 2009, the AFPD filed a fifth motion to enlarge the time to file pretrial motions on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 37), at ¶ 3. The Court granted the motion and enlarged the time as requested until February 9, 2010. (Doc. No. 38).

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warrant." (Doc. No. 49), ¶ 1. (emphasis added).

Sixth Motion: On February 9, 2010, the AFPD filed a sixth motion to enlarge the time to file pretrial motions on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 39), at ¶ 3. The Court granted the motion and enlarged the time as requested until March 24, 2010. (Doc. No. 40).

Seventh Motion: On March 23, 2010, the AFPD filed a seventh motion to enlarge the time to file pretrial motions on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 41), at ¶ 3. The Court granted the motion and enlarged the time as requested until April 26, 2010. (Doc. No. 42).

Eighth Motion: On April 26, 2010, the AFPD filed an eighth motion to enlarge the time to file pretrial motions on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 43), at ¶ 3. The Court granted the motion and enlarged the time as requested until June 10, 2010. (Doc. No. 44).

Ninth Motion: After one full year of "investigating" the facts and law relating to the one count indictment charging Mr. Vue with being a felon in possession of a sawed-off shotgun in his residence between July 27, and 29, 2008, the AFPD said she needed still more time "to complete the investigation of the facts and the law." So it was that on June 10, 2010, the AFPD filed a ninth motion to enlarge the time to file pretrial motions on the grounds that she "needs additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." (Doc. No. 46), at ¶ 3. The Court denied the motion on

June 11, 2010 (Doc. No. 47), and entered a Pretrial Order scheduling trial for July 26, 2010. (Doc. No. 48).

Not one of the nine motions to enlarge the time for filing pretrial motions indicated that counsel had consulted with Mr. Vue about the investigation and her need for "additional time to complete the investigation of the facts and law before she can make an informed decision concerning the filing of pretrial motions." Not one of the nine motions indicate that the AFPD had solicited or obtained Mr. Vue's consent to the repeated continuances that delayed his proceedings for a solid year, and kept him incarcerated (he has been detained pending trial since May 21, 2009).

VII. Discovery of Alleged Potential Conflict

Despite nine implicit representations to this Court that defense counsel had been investigating the one count felon in possession indictment from at least June 25, 2009 through June 10, 2010, the investigation somehow failed to uncover the purported conflict of interest with regard to the CI, who the AFPD knew or should have known existed as of June 11, 2009. Although the Rule 16.1 disclosures did not identify the CI by name, the affidavit of probable cause was quite detailed as to the date the CI was at defendant's residence, and as to the substance of the CI's conversation with defendant.

It is reasonable to expect prudent counsel to interview her client shortly after entering an appearance on his behalf, and shortly after receiving a packet of Rule 16.1 disclosures indicating that a CI claimed to have been in the client's residence between July 27, and July 29, 2008, discussing some specific and memorable matters with her client. Reasonably prudent counsel

also would be expected to file a motion for disclosure of the CI's identity promptly after receiving the Rule 16.1 disclosures, if the client interview was inconclusive or needed follow-up.

The OFPD carefully argues that at the "time of the appointment of the Office of the Federal Public Defender as counsel for Mr. Vue, the Office was not aware of any conflict of interest and not made aware of any conflict of interest by the government." Unopposed Motion to Withdraw As Counsel (Doc. No. 56), at ¶ 1 (emphasis added). According to the OFPD in its Unopposed Motion to Withdraw As Counsel (Doc. No. 56), filed June 16, 2010, government counsel informed defense counsel earlier that day that the confidential informant is a former client of the OFPD. Id. at ¶ 6.

Thus, the OFPD asserts, the government has an obligation to disclose the CI's identity at the inception of the case, or at least to know if the OFPD represented the CI and disclose that to the OFPD, and therefore, the government is responsible for the OFPD's not recognizing any conflict of interests prior to June 16, 2010. See Transcript, July 15, 2010 (Doc. No. 100), at 21 (First Assistant Federal Public Defender Michael Novara stating: "I can't resist saying, if the government had disclosed at the arraignment that their main confidential informant who had provided the information for the search warrant which resulted in the indictment in this case was a former and current client of ours, this would certainly be a different proceeding."). However, the government has a qualified privilege to withhold disclosure of the identity of a confidential informant from whom it has received information concerning alleged criminal activity. See Roviaro v. United States, 353 U.S. 53, 59-60 (1957); see also United States v. Bazzano, 712 F.2d 826, 839 (3d Cir. 1983).

Thus, the identity of a confidential informant is ordinarily protected from disclosure by a qualified privilege, and the government is not obliged to voluntarily disclose confidential informants' identities and will only be ordered to do so in narrow circumstances. The *Rovario* "Court emphasized . . . that protecting an informant's identity serves important law enforcement objectives, most significantly, the public interest in encouraging persons to supply the government with information concerning crimes." United States v. Brown, 3 F.3d 673, 679 (3d Cir. 1993) (citing Rovario, 353 U.S. at 59).

This qualified privilege gives way where disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a case." Roviaro, 353 U.S. at 60-61. The defendant bears the burden of setting forth a specific need for disclosure. United States v. Jiles, 658 F.2d 194, 197 (3d Cir. 1981). The Court must weigh the "particular circumstances of each case" to determine if the defendant has met his burden. See United States v. Harrington, 951 F.2d 876, 877 (8th Cir. 1991) (quoting Roviaro, 353 U.S. at 62).

In this case, the Court determined that defendant Vue did not meet his threshold burden of demonstrating his need for disclosure of the CI or a Franks hearing. Memorandum Order of June 22, 2010 (Doc. No. 70), at 6-11. The well-established law on the confidential informant privilege against disclosure of identity contradicts the OFPD's position that the government is obligated to disclose the identity of its CI at the inception of a case. It may be common practice of the Assistant United States Attorneys in this District to advise defense counsel at an early stage that defense counsel represented a witness or a CI, and that is a practice this Court certainly endorses. Nevertheless, the OFPD's assertion that the government's failure to notify the AFPD of a conflict at the initial appearance fully explains why the OFPD did not discover the conflict

of interest at a much earlier stage of the litigation, and was not the result of any failure of defense counsel to conduct a reasonably diligent investigation during the year she said she was investigating the case, is unconvincing.

VIII. Pre Guilty Plea Proceedings

Ultimately, defendant entered a plea of guilty to the one count indictment. In between (a) the denial of the ninth motion for an enlargement of time to file pretrial motions and this Court's entry of the Pretrial Order on June 11, 2010, and (b) the guilty plea entered on July 15, 2010, a lot of water rapidly flowed under the bridge.

On June 14, 2010, this Court granted defendant's motion to file pretrial motions nunc pro tunc – out of time. (Doc. No. 54). The AFPD filed a number of pretrial motions, including motions for additional discovery and to suppress statements, a motion to compel the government to reveal the identity of the CI, and a motion to suppress physical evidence and, alternatively, for a *Franks* hearing with regard to the CI. See (Docs. Nos. 50-53). The Court has discussed these pretrial motions above to the extent they are relevant to this Memorandum Opinion. The most pertinent pre guilty plea litigation had to do with the OFPD's attempts to withdraw from representation of Mr. Vue on the eve of trial, after representing him and "investigating the facts and the law" of his case for over one year.

A. OFPD's Motions to Withdraw as Counsel for Defendant

1. First Motion to Withdraw

Five days after this Court set the trial date, the AFPD filed a Motion to Withdraw. This first Motion to Withdraw requested leave for the Office of the Federal Public Defender to

withdraw from its representation of defendant, stating that the AFPD had just discovered the potential conflict of interest in that the Office of the Federal Public Defender formerly represented the CI mentioned in the affidavit of probable cause. Unopposed Motion to Withdraw As Counsel, June 16, 2010 (Doc. No. 56). Specifically, this Motion to Withdraw stated that on "June 16, 2010, after meeting with law enforcement agents, government counsel informed defense counsel that the confidential informant is a former client of the Office of the Federal Public Defender," and that because defense counsel's former client is the government's informant, and because the credibility and reliability of the confidential informant is crucial to the defense of Mr. Vue's case, the Office of the Federal Defender has an actual and potential conflict of interest." Id. at ¶¶ 6, 8.

The OFPD's Motion to Withdraw was vague and conclusory with regard to the nature of the perceived conflict, stating only that the OFPD cannot simultaneously continue to represent Mr. Vue, its client for over one year, while maintaining its duties of loyalty and confidentiality to its former client. Id. At 9. There were no particulars offered in the motion in support of this alleged conflict, such as the time period in which the CI was represented by the OFPD, the nature of the proceedings (i.e., trial, negotiated plea, other disposition of case, etc.), the identity of the AFPD who represented the CI and whether that attorney is the same AFPD assigned as primary counsel for Mr. Vue, and whether either Mr. Vue or the CI were contacted by anyone with regard to whether they would waive any conflict of interests posed by the former client problem. Id. at 6-10. None of those matters would require divulging of any confidential information. These are routine, and probably obligatory, facts that any Court would need to know in deciding whether or not to permit withdrawal of counsel it appointed to represent an indigent defendant and appoint

substitute counsel, especially where defense counsel was appointed a year ago, represented to the Court that she had been investigating the case throughout that year, and yet did not discover the conflict or notify the Court of any potential conflict until after the Court scheduled the case for trial.

On June 17, 2010, this Court denied said Motion without prejudice, in order "to insure proper transition of case to counsel who will be able to try the case on schedule. It is further Ordered that substitute counsel be appointed forthwith. All scheduling orders remain in effect." (Doc. No. 59). On June 18, 2010, this Court supplemented the June 17, 2010 Order, noting that the Government had filed a response (Doc. No. 57) indicating that it would not call the confidential informant as a witness, thereby rendering defense counsel's alleged conflict of interest between the CI and defendant moot. See Brown, supra.

The Supplemental Order also indicated that, if this Court determined a Franks hearing was warranted pursuant to Defendant's motion for a hearing (Doc. No. 51), the Court would "revisit the issue and adjust the date for the Franks hearing to fit the schedule of substitute counsel," but in any event, the pretrial and trial dates would remain in place. Defense counsel sought a Franks hearing based upon her averments that Detective Gault's affidavit of probable cause misstated Gault's previous use of and reliance upon the CI in other investigations and prosecutions.

2. Second Motion to Withdraw

On June 21, 2010, before this Court ruled upon defense counsel's request for a Franks hearing, the OFPD filed a Second Motion to Withdraw as defense counsel, indicating that "[defense] counsel is faced with an actual conflict of interest that requires withdrawal from the

case, regardless of how the court rules on [defendant]'s request for [a] Franks hearing, notwithstanding the government's stated intention not to call the confidential informant in its case in chief." (Doc. No. 68.) In its Second Motion to Withdraw, the OFPD claimed that in order to "provide competent legal representation to [defendant], defense counsel must independently investigate the confidential informant/former client who purportedly provided the government with key information against [defendant]." (Doc. No. 68), p. 4. In support, counsel cited to United States v. Gambino, 864 F.2d 1064 (3d Cir. 1988), claiming that the facts present in this case created "an actual conflict of interest." (Doc. No. 68), p. 8.

Like the first Motion to Withdraw, the second was not specific or illuminating with regard to the nature of the alleged conflict, nor did it set forth any particulars about the former representation of the CI by some AFPD (i.e., the particulars set forth in the preceding section) and how that might conflict with representation of Mr. Vue. Id. At ¶¶ 1-7. Instead, the second Motion to Withdraw offered only the following generalities about the role and ethical obligations of defense counsel, without any attempt to show how the general principles espoused therein might be applicable in this case: (i) "defense counsel must independently investigate the confidential informant/former client who purportedly provided the government with key information against Mr. Vue"; (ii) "counsel cannot meet their obligation to independently investigate the informant by relying on the prosecutor's assurances that the informant is not significant to Mr. Vue's defense"; (iii) "defense counsel [must] refrain from divulging the confidences and secrets of the former client/ informant, even if divulgence would be in Mr. Vue's best interest"; (iv) "defense counsel cannot subpoena the former client/ informant to testify for or against Mr. Vue" or "put the former client in the position of having to affirm or discredit

the government's case"; (v) "defense counsel cannot, in good faith advise the former client to waive his or her attorney/client privilege"; and (vi) "there are, indeed, plausible (and viable) defense strategies and tactics which cannot be pursued because to do so would inherently conflict with other loyalties or interests." Id. at 4-8.

Reading these two vague and conclusory Motions to Withdraw exactly as they are written, the OFPD took the position that a district court must accept, uncritically, the opinion of the AFPD that there is or may be a conflict and that the conflict cannot be cured, and that a district court has no role to play in the determination of whether substitute counsel should be appointed to take the place of counsel previously approved and authorized by the Court, regardless of how untimely the motion, the late stage of the proceedings, or whether there are alternatives to substitution that would cure or ameliorate any conflict problem. The OFPD also appeared to be of the view that a district court somehow infringes on its mission by insisting counsel's motion to withdraw set forth some facts and particulars to demonstrate the existence of an actual or substantially possible conflict of interest, and that a district court's institutional interests and the interests of the public in, among other things, speedy trials, were irrelevant to the question whether appointed counsel should be permitted to withdraw.

In short, reading the Motions to Withdraw (and the OFPD's Motions to Stay, discussed below), a reasonably disinterested observer would deem the OFPD's position to be that a district court has little or no discretion to refuse to grant leave to withdraw as court appointed counsel if the OFPD unilaterally decides it has a real or potential conflict.

3. Court Orders Denying Motions to Withdraw

On June 22, 2010, this Court entered an Order addressing all of defendant's outstanding pretrial motions,[2] including the OFPD's Second Motion to Withdraw. (Doc. No. 70). In the portion of its Order addressing the Second Motion to Withdraw, the Court denied counsel's request, but directed the OFPD to secure additional counsel for defendant. (Doc. No. 70), pp. 12-14. This Order further stated, "[t]his denial is without prejudice to further case developments." (Doc. No. 70), p. 14 (emphasis added).

As the Court subsequently explained, there was no indication on the record that additional, independent counsel would be "incapable of conducting the independent inquiries necessary (including the eight areas of inquiry/'duties' set forth at pages 6 and 7 of the Motion for Stay, Doc. No. 75);" and that it would be in defendant's best interests "to be represented at trial by a defense team consisting of: (a) defense counsel (OFPD), which purports to have been investigating this case for twelve months, plus (b) additional, independent counsel who is already working on the defense and who, assuming the defense team follows proper protocol, is capable of independently handling any purported conflict with the former client in the event that becomes necessary," thus eliminating the OFPD's "dilemma." Memorandum Order Denying Defendant's Motion to Stay Proceedings (Doc. No. 75), (Doc. No. 87), at 3.

As further explained in that Memorandum Order, the Court considered this dual representation "a common sense approach" that balanced the private and public interests

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[2] With respect to defendant's request for a Franks hearing, the Court concluded, inter alia, that the detective did not make any misstatements concerning his past use of, and reliance on, the CI, and specifically held, "because defendant has failed to meet either prong of the Franks test, this Court will deny the Motion to Suppress Evidence or, in the Alternative, Hold a Franks Hearing." (Doc. No. 70), p. 11.

presented by the OFPD's attempt to withdraw on the eve of trial, after defendant has been in custody awaiting trial for over twelve months while the OFPD investigated the facts and the law, and presumably developed a rapport with Mr. Vue. Id.

The AFPD has never offered any authority supporting its position that appointment of additional, independent counsel fails to remedy the perceived conflict of interests, or that it is not a common sense, practical and professionally ethical solution to its dilemma. In fact, in its first Motion to Stay Proceedings, the AFPD acknowledged that she "tried, but could find no authority suggesting that joint representation by conflicted and conflict-free counsel ameliorates an actual conflict of interest." Motion to Stay Proceedings (Doc. No. 75), at 2, n.1.

By the absence of any citations of authority in support of its position in the Motion to Stay Proceedings, it is apparent that the OFPD could find no authority suggesting that joint representation by conflicted and conflict-free counsel does not ameliorate an actual conflict of interest. As is seen in Section VIII.D below, however, all of the authority supports the obligation of the district courts to consider and balance all of the implications and interests in deciding whether to permit court-appointed counsel to withdraw, and supports the discretion of the district courts whether to grant such a request, and substitution of appointed counsel is presumptively inappropriate, especially late in a case.

B. Appearance of Additional Counsel

Additional counsel, Adam B. Cogan, Esquire, entered his appearance on June 25, 2010 (Doc. No. 74), and immediately began active and effective representation of defendant. See Motion to Continue Suppression Hearing and Trial (Doc. No. 81).

C. OFPD's Failure to Satisfy Legal Standards for Withdrawal

On June 23, 2010, the Court elaborated on its decision with respect to denial of the OFPD's Second Motion to Withdraw by way of a Supplemental Order. See (Doc. No. 71). In this Supplemental Order, the Court discussed two cases referenced by the OFPD (Gambino, supra, and United States v. Moscony, 927 F2d 742 (3d Cir. 1991)), in support of the Second Motion to Withdraw. (Doc. No. 71), p 3-6.

In sum, the Court specifically noted that in this case, unlike Gambino, Moscony, and other cases cited by the OFPD, the prosecution asserted that it would not call the CI to testify. Id. The Court also noted that unlike Moscony, where the defense attorney was simultaneously representing various individuals whose testimony could be used against one another, this case presented defense counsel with a dissimilar challenge. Id.

Here, the AFPD claimed that in order to defend defendant in this matter, she needed to investigate the OFPD's former client (i.e. the CI), who the OFPD represented in a separate matter. Id. Without proffering any particulars about any conflicts, and speaking only in generalities and conclusions, the OFPD expressed concern about its inability to maintain its obligation of loyalty and confidentiality to the former client with respect to any past information the former client shared with the OFPD during the prior case. Id. This Court disagreed, noting that defense counsel steadfastly refused to explain or otherwise describe how (the manner in which) such an investigation might create "an actual conflict." Id.

In addition to noting these critical distinctions from the case law relied upon by the OFPD, the Court's Supplemental Order also held that defense counsel failed to meet or even make a proffer as to the second prong of the two-prong test announced in Gambino. Id. To this

end, this Court succinctly held that the OFPD failed to proffer anything to support its claim that its nearly year-old investigation of this matter and trial preparation had to immediately cease "due to the attorney's other loyalties or interests" to its former client, the CI. (Doc. No. 71) (citing Gambino, 864 F.2d at 1070). This Court further noted that the OFPD's motions to withdraw were conclusory, merely asserting in summary fashion that investigating the former client (*i.e.* the CI) would inherently conflict with its representation of defendant, and expressly stating in a footnote that the OFPD was under no obligation to say anything more on that subject. Id.

The OFPD's insufficient averments with regard to the second prong of Gambino, combined with the fact that defendant had been incarcerated for nearly a year at the time the AFPD filed her ninth motion for an extension of time to file pretrial motions because she needed "additional time to complete the investigation of the facts and law," coupled with the fact that trial was scheduled to commence on July 26, 2010, compelled this Court to deny the OFPD's Second Motion to Withdraw as Counsel, finding no factual, legal or rational basis to further delay the trial based on the OFPD's unarticulated and attenuated alleged conflict of interests regarding a former client/CI who would not be a witness in the trial.

D. It is within the Discretion of the District Court to Appoint Counsel for Indigent Defendants and to Deny Appointed Counsel's Belated Attempts to Withdraw As Counsel for Mr. Vue on the Eve of Trial

At his initial appearance, Mr. Vue indicated he could not afford counsel and requested Court appointed counsel. In accordance with the authority and responsibilities vested in the District Court pursuant to the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, Federal Rule of Criminal Procedure 44, the United States District Court for the Western District of Pennsylvania Plan for Implementation of the CJA (last revised July 28, 2003), and this Court's Local Rules of

Criminal Procedure, the Court, through a United States Magistrate Judge, appointed the OFPD to represent Mr. Vue on February 13, 2009, and designated one of the AFPDs as his primary counsel.

1. The Criminal Justice Act

The CJA, 18 U.S.C. § 3006A(b), provides for the appointment of counsel for the indigent, as follows: "(b) Appointment of counsel. -Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. . . . Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate judge or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown." (emphasis added).

The duration and substitution of counsel is governed by 18 U.S.C. § 3006A(c) which provides, in relevant part: "(c) Duration and substitution of appointments. -A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings. . . . The United States magistrate judge or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings." (emphasis added).

The CJA further directs each "United States district court, with the approval of the judicial council of the circuit, . . . [to] place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section." 18 U.S.C. § 3006A(a).

2. Criminal Justice Act Plan of the United States District Court for the Western District of Pennsylvania

Available on the OFPD website (http://paw.fd.org), the CJA Plan for this District provides for Court-appointment of attorneys for indigent accused, and "appointed attorneys" includes the OFPD and its attorneys. CJA Plan, III.B. Appointed attorneys must be eligible and qualified, and "[a]ttorneys appointed pursuant to the CJA shall conform to the highest standards of professional conduct, including but not limited to the provisions of the Pennsylvania Rules of Professional Conduct." CJA Plan VIII.B. Once appointed, the CJA Plan provides that counsel "shall continue the representation until the matter, including appeals or review by certiorari, is closed; until substitute counsel has filed a notice of appearance; until an order has been entered allowing or requiring the person represented to proceed *pro se*; or until the appointment is terminated by court order." CJA Plan VIII.D.

3. Pennsylvania Rules of Professional Conduct.

Interestingly, the OFPD in the Vue case stated that it had "no alternative but to petition for a Writ of Mandamus in the appellate court" because compliance with this Court's Orders would compel it to violate the Pennsylvania Rules of Professional Conduct. First Motion to Stay Proceedings (Doc. No. 75), at 4. But in the same paragraph, the OFPD quotes the second sentence of the Rule of Professional Conduct, Rule 1.16(c), which plainly extricates a lawyer

who complies with a court order denying his or her motion to withdraw from any ethical dilemma, by explicitly providing that the lawyer does not thereby violate the Pennsylvania Code of Professional Conduct. "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Id. (emphasis added)

Rule 1.16(c) represents the considered judgment of the Supreme Court of Pennsylvania about the appropriate accommodation of the Sixth Amendment's and Pennsylvania Constitution's guarantee of conflict-free counsel for the indigent accused, counsel's professional and ethical obligations to her or his client and to the appointing authority, and the public's interests in the fair and efficient administration of justice. Rule 1.16(c) also provides safe harbor for a lawyer who complies with the court's orders even though she perceives a conflict and an ethical dilemma and unsuccessfully requests leave to withdraw. If there were any doubt, the first sentence of Rule 1.16(c) dispels it: "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." (emphasis added).

The Supreme Court of Pennsylvania, in a 2004 Per Curiam ruling, addressed Rule 1.16(c) in rejecting an emergency application to stay a trial court's order finding court appointed counsel in contempt for refusing to obey its order to continue representing her client, who had threatened the attorney. Commonwealth v. El Shabazz, 577 Pa. 655, 848 A.2d 918 (2004). Defense counsel insisted she had an irreconcilable personal conflict and could not effectively or ethically continue to represent the defendant, but the trial court disagreed and ordered her to stay the course.

The Supreme Court refused to stay the trial. In his Concurring Opinion in Support of Denial of Stay, Justice Ronald Castille (now Chief Justice) remarked that "issuing a stay would reward a recalcitrant attorney for flouting her ethical obligation to the court. Rule 1.16(c) of the Rules of Professional Conduct provides that, 'when ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.' . . . Lawyers, who are officers of the court, should not be encouraged to act petulantly or defiantly when confronted with orders with which they disagree. . . ."). 848 A.2d 920 (emphasis added).

Thus, contrary to the OFPD'S view, the ethical violation according to the Pennsylvania Rules of Professional Conduct is in refusing to comply with this Court's lawful Orders denying its Motions to Withdraw, not in complying with the Orders despite its misgivings, as Rule 1.16(c) explicitly requires counsel to follow the Court's Orders and, when ordered to do so by the tribunal, to continue representation notwithstanding counsel's belief that there is good cause to terminate representation.

4. Rule 5 of the Local Rules of Criminal Procedure for the Western District of Pennsylvania.

LCrR 5 of the Local Criminal Rules for this District provides for Court appointment of counsel for indigent defendants, as follows:

LCrR 5. INITIAL APPEARANCE BEFORE MAGISTRATE JUDGE

> **A. Opportunity to Consult With Counsel.** A defendant shall be given an opportunity to consult with counsel at his or her Initial Appearance and before an initial interview with Pretrial Service Officers. The Federal Public Defender, as directed by the Court, will provide advice of rights to defendants before their interview with Pretrial Services.

* * *

> **C. Eligibility for Appointed Counsel.** When a defendant requests appointment of counsel, and the Court determines that the defendant is eligible for appointed counsel, the Court will appoint counsel under the Criminal Justice Act at the time of the Initial Appearance. (emphasis added).
>
> * * *
>
> **E. Withdrawal of Appearance.** In any criminal proceeding, no attorney whose appearance has been entered shall withdraw his or her appearance except upon filing a written petition stating reasons for withdrawal, and only with leave of Court and upon reasonable notice to the client. See also LCvR 83.2.C.4. (emphasis added).

5. Application of Above Authority

There can be no reasonable doubt that counsel appointed by an Article III Court is neither entitled nor permitted to unilaterally withdraw from a case and substitute counsel based on his or her own perception that there is a conflict of interest or that other good cause exists for terminating the representation. Counsel must present her or his perceived grounds for withdrawal and substitution in a written motion, and the Court must give due regard for counsel's stated reasons, as the Court did in this case. But the decision is not appointed counsel's to make. Rather, the grant or denial of court-appointed counsel's motion to withdraw and substitute new counsel is committed to the sound discretion of the trial court, after consideration of all facts and circumstances, and after careful balancing of all interests, institutional, public and individual.

The Federal Practice and Procedure treatise summarizes the applicable principles as follows:

> The [CJA] statute provides that the court, or other appointing authority, may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings. The court has discretion and need not remove an appointed attorney on the request of the defendant. (emphasis added).The defendant with appointed counsel has no right to

> choose his counsel, and a court may require good cause before new counsel will be appointed. The lawyer cannot withdraw without court approval, and the court should be slow to grant that approval. Continuity in representation is desirable, and the court should allow withdrawal only for some compelling reason. (emphasis added).
>
> If leave to withdraw is granted, the lawyer must remain in the case until a new lawyer is appointed in order to avoid a hiatus in the representation. The lawyer withdrawing from the case is under an obligation to inform his successor, by way of a brief report, of all action previously taken and of any information relevant to the defendant's case.

Wright, King, Klein and Henning, 3B, Federal Practice and Procedure (West 2000 ed.), § 738, Withdrawal of Appointed Counsel. See also United States v. Theodore, 354 F.3d 1, 6 (1st Cir. 2003) ("As replacing defense counsel so close to the beginning of trial is a measure appropriate for only the most extraordinary circumstances, we cannot hold that the district court abused its discretion when it crafted a compromise solution [i.e., appointing additional counsel experienced in federal criminal practice] and denied [defense counsel's] motion to substitute counsel. The court's accommodation of [defense counsel's] claimed unfamiliarity with federal procedure was reasonable under the circumstances and satisfied [defendant's] Sixth Amendment right to effective assistance."); United States v. Birrell, 286 F.Supp. 885, 898 (S.D.N.Y. 1968), mandamus refused sub nom Legal Aid Society of N.Y. v. Herlands, 399 F.2d 343 (2d Cir. 1968) (appointed counsel's motion to withdraw because defendant had filed lawsuit against Legal Aid Society, of which counsel were members, denied as the conflict was manufactured by defendant; "Although counsel may find it extremely difficult and emotionally taxing to perform their professional services under the circumstances, they must do the very best they can. The Court is confident to the point of moral certainty that, despite [defendant's] ploy of suing his assigned counsel, The Legal Aid Society, through its attorneys, will continue to represent him with skill

and devotion.").

As the United States Court of Appeals for the Third Circuit stated in United States v. Laura, 607 F.2d 52 (3d Cir. 1979):

> [I]f a defendant chooses a particular counsel, the sixth amendment prevents a court from taking any "arbitrary action prohibiting the effective use of (a particular) counsel." . . . In reaching this conclusion we are not suggesting that a court lacks any authority to dismiss a defendant's counsel, or to reject a defendant's decision to select a particular individual for his defense. This court has already recognized that "there is no absolute right to a particular counsel," and the trial judge has some discretion to effect the defendant's selection of counsel. . . . For example, unless a defendant can show good cause . . . , the court may deny an indigent defendant's wish to obtain different court-appointed counsel. . . . Also, in certain circumstances, a court may deny a defendant's attempt to obtain new counsel immediately before trial. . . . And a court, under its supervisory authority, if it deems it necessary, may dismiss counsel because the defendant would otherwise be inadequately represented.

607 F.2d at 57 (citations omitted).

The timing of motions to withdraw weighs strongly in favor of denying counsel's or defendant's request for substitute counsel. See, e.g., United States v. Cassel, 408 F.3d 622, 638 (9th Cir. 2005) (untimeliness of request for new counsel made on day of sentencing "weigh[s] heavily" in favor of denying request); United States v. Walters, 309 F.3d 589, 592 (9th Cir. 2002) (defendant's Sixth Amendment right to substitute counsel of his choosing on eve of sentencing is qualified by the need for "fair, efficient, and orderly administration of justice.").

In United States v. Myers, 294 F.3d 203, 206 (1st Cir. 2002), the Court of Appeals for the First Circuit stated that once a court "appoints an attorney to represent an accused, a subsequent decision to replace that attorney is committed to the informed discretion of the appointing court.

In exercising that authority, the court must take into account the totality of the circumstances then obtaining (including the need for economy and efficiency in the judicial process). . . . This means that there must be good cause for rescinding the original appointment and interposing a new one. . . . Good cause depends on objective reasonableness . . . ." (emphasis added; citations omitted).

In this District, as in most, Article III District Court Judges and Magistrate Judges appoint lawyers to represent the indigent, including the OFPD and its attorneys, and once appointed, counsel is not permitted to withdraw from any case without leave of Court upon written motion setting forth good cause. The District Court is obligated to consider appointed counsel's stated cause for withdrawal in light of all attendant circumstances, but cannot simply accept counsel's claimed good cause without further inquiry into the asserted grounds. Even if the Court agrees that there is good cause for termination, it must consider and weigh the competing interests.

The Court must therefore balance counsel's asserted grounds for terminating the representation against all other competing interests, including the public interest in fair, speedy and just administration of justice and the impact of permitting withdrawal of counsel on the accused and on the other participants in the criminal justice system. It is within the Court's discretion to grant leave to appointed counsel to withdraw and to appoint substitute counsel, but in the absence of permission by the appointing authority, appointed counsel must continue his or her representation of the defendant.

From all of the foregoing, appointed counsel may not unilaterally withdraw from representation of a client, and must seek leave of court for permission to withdraw. It is within the Court's discretion whether to grant leave and substitute counsel, after consideration of the totality of the circumstances. In this case, the OFPD simply did not make a prima facie showing

that there was an actual or a serious potential for a conflict of interest when it made vague averments that someone from the OFPD represented a non-witness confidential informant on some matter (maybe related, maybe unrelated), and has never even acknowledged that there are competing public and individual interests implicated, let alone argue why its perception of conflict/good cause automatically trumps such important, countervailing interests, or why this Court's perception of the appropriate balance should be disregarded.

After careful consideration, weighing and balancing all relevant factors and interests, it was within this Court's discretion to deny the OFPD's last minute attempts to withdraw from this simple case after a purported year of investigation and after trial had been scheduled, and to appoint additional counsel to handle any conflict situation, out of an abundance of caution and to protect Mr. Vue from any possible prejudice arising from any possible conflict.

E. OFPD's Motions to Stay Proceedings and Notice of Writ of Mandamus

1. First Motion to Stay

Disappointed with this Court's denial of its Second Motion to Withdraw as Counsel, the OFPD immediately filed a Motion to Stay further proceedings in this case. (Doc. No. 75). The Motion to Stay stated as follows:

> [U]ndersigned counsel moved to appoint Adam B. Cogan, Esq. and asked to be relieved as counsel to Mr. Vue. (Doc. 72). On June 24, 2010, the Court appointed Attorney Cogan as "additional counsel" for Mr. Vue and denied undersigned counsel's request to be relieved. (Doc. No. 73).
>
> Because undersigned counsel maintains that continued representation of Mr. Vue poses a conflict of interest, undersigned counsel intends to seek review of the orders denying the various motions to withdraw, in the Court of Appeals for the Third Circuit, <u>by way of Petition</u>

> for Writ of Mandmamus.
>
> In light of this intention, undersigned counsel requests that the Court stay the June 24, 2010 Order and these proceedings, pending resolution of the mandamus petition.

Motion to Stay (Doc. No. 75) at 2. (emphasis added)

In support, the OFPD argued, inter alia, that it "has no alternative but to petition for a Writ of Mandamus in the appellate court" because the Court's Orders required it to continue to "represent Mr. Vue even though Mr. Vue's interests are materially adverse to a former client who is an informant against Mr. Vue." Id. at 4. This Motion also indicated the OFPD's belief that an interlocutory appeal "does not lie" from the Court's Orders denying its Motions to Withdraw, which is why, at that time, it believed it needed to pursue the Writ of Mandamus. Id.

The Motion to Stay is no more specific and adds no more particulars about the purported conflict of interests or the nature of the OFPD's prior representation of the CI than did the Motions to Withdraw. However, the Motion to Stay adds a more complete list of "things the OFPD cannot do" while representing Mr. Vue because of the purported conflict. The OFPD reiterated that "counsel has a duty to independently investigate the confidential informant," but because of the "continuing duties of loyalty and confidentiality owed to the former client/ informant, the Office of the Federal Defender (1) will not interview the former client/informant in advance of the suppression hearing or trial, (2) will not inquire about information that was provided against Mr. Vue, (3) will not challenge the former client's credibility in or out of court, (4) will not call the former client as a witness in Mr. Vue's defense, (5) will not use any confidential information learned during the representation of the former client that may or may not be helpful to Mr. Vue, (6) will not ask the former client/informant to confirm, deny and/or

explain information that has been gleaned during the investigation of this case, (7) will not advise the former client/informant to waive the attorney-client privilege, and (8) will not seek to impeach the veracity of any government witness based on information learned about the client through former representation." Id. at 6-7.

Moreover, the OFPD asserted in its Motion to Stay that its "requests to withdraw implicate issues that are inseparable from the merits of the underlying case, namely, whether the Court's orders compromise Mr. Vue's constitutional rights to effective assistance of counsel and a fair trial. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) (permitting interlocutory appeal from nonfinal orders that resolve important issues that are completely separate from the merits of the underlying action)." Id. at 5. The OFPD also asserted that it "cannot divulge trial strategies or betray the confidences of the former client for the reasons previously explained" in its Motions to Withdraw, and therefore, the OFPD "has no alternative remedy other than to seek review of the Court's orders by way of Petition for Writ of Mandamus." Id. at 5-6.

2. Supplemental Motion to Stay

The OFPD filed its second Motion to Stay on June 28, 2010. (Doc. No. 79). This supplement to the first motion stated that, upon further research, the OFPD had located legal authority to support the proposition that an interlocutory appeal does in fact lie in the Court of Appeals from an order denying counsel's motion to withdraw, and requested that the Court stay the proceedings, pending resolution of defense counsel's interlocutory appeal in the Court of Appeals, and alternative request for an Emergency Petition for a Writ of Mandamus.

IX. The Office of the Federal Public Defender Asserts "Institutional Interests," As Opposed to Mr. Vue's Personal Interests, In Its Motion to Stay

The OFPD emphatically stated, in its Motion to Stay and subsequent filings, that it would (and it did) seek appellate review in its own right, in order to foster and vindicate the threat to the institutional integrity of the OFPD which it perceived when this Court declined to allow the OFPD to withdraw from representation of Mr. Vue. With the filing of the Motion to Stay, the OFPD began to assert the institutional interests of the Office of the Federal Public Defender, as opposed to the personal, constitutional rights of Youa Vue under the Sixth Amendment to effective representation by counsel dedicated to advocating his individual interests, especially his liberty interest in not remaining in jail any longer than necessary.[2]

The OFPD's institutional interests are set forth in some detail in its Motions for Disqualification of this Judge in every case where an AFPD represents a defendant before this Court, except for Mr. Vue's case. (The 21 Motions for Disqualification filed in the other cases are discussed in Section XI, infra).

For example, in its Motion for Disqualification in United States v. Peays, 10cr0070, filed the evening prior to the scheduled Final Pretrial Conference, with the jury scheduled to be picked on the next business day, the OFPD states as follows:

> On June 26, 2010, FPD counsel filed with this court a Motion to Stay the Proceedings. Docket Entry No. 75. The stay was sought to permit the FPD to seek a writ of mandamus in the United States Court of Appeals for the Third Circuit with respect to the court's refusal to recognize a conflict of interest and allow FPD counsel to withdraw. Docket Entry No. 75 at 2. On June 28, 2010, FPD counsel filed a supplement to the motion to stay, indicating its intent to proceed by way of an interlocutory appeal and to seek a

[2] There is no indication in the record that Mr. Vue consented to any of the FPD's litigation tactics.

> writ of mandamus in the alternative. Docket Entry No. 79 at 2. The same day, FPD counsel filed a Notice of Appeal with respect to the court's various orders regarding withdrawal. Docket Entry No. 78; see Docket Entry Nos. 70, 71 and 73. On June 29, 2010, the appeal was entered on the docket of the Third Circuit. United States v. Vue, Case No. 10-2932 (3d Cir. June 29, 2010).
>
> Insofar as this court had, on June 23, 2010, scheduled a Suppression Hearing for June 30, 2010, and denied CJA counsel's motion to continue that hearing, Docket Entry Nos. 81 & 82; June 23, 2010, Text-Entry Scheduling Order, FPD counsel faced a significant dilemma: it could continue, as ordered, to serve as counsel and appear on Mr. Vue's behalf in violation of the Pennsylvania Rules of Professional Conduct, or act in contravention of the court's order and face contempt of court proceedings.
>
> Given the dilemma, which implicated the FPD's institutional interests as well as the personal and professional interests of FPD counsel, the FPD consulted with the Administrative Office of the United States Courts, Offices of General Counsel and of Defender Services and thereafter enlisted the services of W. Thomas McGough, Jr., a partner at ReedSmith LLP ("Reed Smith") who had represented the FPD in the past. Mr. McGough was asked to advise the FPD and to accompany FPD counsel to the Suppression Hearing for purposes of advising FPD counsel in the event they were asked to say or do anything that would risk violation of the ethical rules and/or the court's direction.

Motion for Disqualification (Doc. No. 42 at Crim.No. 10-070), at 2-4 (emphasis added).

The OFPD had avenues available other than filing Motions to Disqualify the presiding District Judge in 21 unrelated criminal cases, in order to protect and vindicate its institutional interests, including this obvious alternative – it could have continued to represent Mr. Vue along with Mr. Cogan who was appointed to ameliorate any conflicts regarding the CI (which were unlikely given that the CI was not going to be a witness at trial), and thereafter appeal any conviction and sentence to the United States Court of Appeals for the Third Circuit. If Mr. Vue was acquitted, then the OFPD is certainly capable of approaching the Board of Judges, formally

or informally, to seek consensus as to the best way to protect its mission and preserve its integrity, while acknowledging the legitimate institutional and constitutional concerns of the federal district courts. Such an alternative could have accomplished the OFPD's institutional goals amicably, without jeopardizing Mr. Vue's chance for an acquittal or, as quickly happened after Mr. Cogan was appointed, a favorable plea agreement.

None of the OFPD's Motions for Disqualification allege any lack of impartiality as to any of the 21 individual defendants (nor to criminal defendants in general, nor for that matter, to Mr. Vue), nor do these Motions for Disqualification point to any evidence in the record to support a charge that this Court lacks impartiality in any of these cases. Instead, the OFPD alleges that this Court lacks impartiality toward all OFPD attorneys, not their clients, because this Court questioned the increasingly common practice, by a small number of AFPDs, of filing repetitious, boilerplate motions for extensions of time within which to file pretrial motions (as seen in the Hall and Vue cases; see also United States v. Cunningham, 07cr0298 (12 motions to enlarge time for pretrial motions) and United States v. Clemons, 08cr0028 (15 motions to enlarge time for pretrial motions)), and because this Court denied the OFPD's Motions to Withdraw in the Vue case.

It is significant that the OFPD filed a Notice of Appeal from this Court's Orders denying the Motions to Withdraw and its Motions to Stay the Vue proceedings, but then withdrew its appeals from those Orders, even though those Orders are the foundation for its 21 Motions to Disqualify in the 21 other unrelated OFPD criminal cases before this Court.

X. Denial of Motion to Stay - Memorandum Order of June 30, 2010 (Doc. No. 87)

By Memorandum Order dated June 30, 2010 (Doc. No. 87), this Court denied the OFPD's Motion to Stay (Doc. No. 75), for the following reasons:

> **I. Summary of Decision**
>
> Based upon the facts of this case and the record, this Court held that the Federal Public Defender Office's prior representation of a confidential informant (*i.e.*, a former client), whom the government did not plan to call in its case-in-chief, did not pose an "actual conflict of interest" (using defense counsel's own words at Doc. No. 68, p. 3, ¶7) under United States v. Gambino, 864 F.2d 1064 (3d Cir. 1988). See Supplement to Memorandum Order (Doc. No. 70), (Doc. No. 71). In light of the Court's Orders and its supplements to those Orders (Doc. Nos. 59, 70-71) denying defense counsel's Motions to Withdraw (Doc. Nos. 56 and 68), the Federal Public Defender ("FPD" or "defense counsel") has now filed a Motion to Stay Proceedings (Doc. No. 75), which this Court will deny for the following reasons.
>
> **A. Defense Counsel Relies Upon "Facts" that are Inconsistent with the Record**
>
> First, nothing on the record indicates there would be any benefit to defendant, who has been incarcerated for over a year awaiting trial of this matter, were he to lose the fruits of the FPD's twelve-month "investigation of the facts and law," which is what would occur if the FPD was permitted to abruptly withdraw from his case.[FN 1] (emphasis added)
>
> [FN 1] The FPD is now taking the position that it will not turn over the file materials of its twelve-month investigation to defendant's additional independent counsel (see Doc. Nos. 81, p. 4) which means that both the public (including the taxpayers) and defendant will lose the benefits of this year-long investigation.
>
> Second, nothing on the record indicates that defendant desires new counsel or has consented to defense counsel's withdrawal on the eve of trial from his case. (Pretrial conferences are scheduled for July 15 and 20, 2010 with jury selection and the trial beginning on July 26, 2010.) (emphasis added)

Third, nothing on the record indicates that defendant ever agreed to, or even knew about, the nine (9) Motions for Extensions of Time counsel filed in this case, extending his pretrial incarceration to over twelve months. See Doc. nos. 29, 31, 33, 35, 37, 39, 41, 43, and 46. (emphasis added) Moreover, each of these motions were apparently a form motion to enlarge time, and stated only that the motion was unopposed by the government and, generically, proclaimed that counsel "needs additional time to complete the investigation of the facts and law before they can make an informed decision concerning the filing of pretrial motions." *Id.* at ¶ 3.

Fourth, nothing on the record indicates how, after twelve months of "investigation of the facts and the law," defense counsel suddenly "discovered" a purported conflict of interest, only after the ninth Motion for Extension of Time (Doc. No. 46) was denied (Doc. No. 47), and the pretrial and trial schedule was established by Doc. No. 48 (dated June 11, 2010). (emphasis added)

Fifth, this Court has always stated that if an actual conflict of interest was brought to the Court's attention or became apparent, the Court would consider a renewed Motion to Withdraw. See doc. nos. 59 and 70, p. 14 ("This denial is without prejudice to further case developments.").

B. Additional, Independent Counsel Has Been Appointed – Common Sense Approach

Out of an abundance of caution, the Court has granted leave for additional counsel (independent and not from the Federal Public Defender's Office) to join the defense team. See Doc. No. 70, p. 14. Said additional counsel has already entered an appearance, (see doc. nos. 72, 73, and 74), and is actively engaged in preparation. See Doc. No. 81.

Nothing on the record indicates that additional counsel is incapable of conducting the independent inquiries necessary (including the eight (8) areas of inquiry/"duties" set forth at pages 6 and 7 of the Motion for Stay, Doc. No. 75).

Nothing on the record indicates that it would not be in the best interest of defendant to be represented at trial by a defense team consisting of: (a) defense counsel (FPD), which purports to have been investigating this case for twelve months, plus (b) additional, independent counsel who is already working on the defense and who, assuming the defense team follows proper protocol, is capable of independently handling any purported conflict with the former client in the event that becomes

necessary. (emphasis added)

This dual, yet independent, representation eliminates the FPD's "dilemma" of possibly being placed in the position of having to cross-examine its former client or being chilled in its investigation of the former client, because independent new counsel could do so based on his own investigation, even though it is hard to imagine a scenario where defense counsel would call the confidential informant in defendant's case-in-chief.

The Court considers this dual representation to be a common sense approach, balancing the private and public interests presented by the FPD's attempt to withdraw on the eve of trial after defendant has been in custody awaiting trial for over twelve months. (emphasis added)

C. Public Interest Dictates the Denial of this Motion to Stay

First, as stated above, the FPD defense team sought nine (9) Motions for Extensions of Time to investigate this relatively routine case – a one count indictment charging defendant with being a convicted felon in possession of a Model 500C, 20 gauge, Mossberg shotgun in violation of 18 U.S.C. § 922(g)(1) on one day in July, 2008. It is difficult to imagine why a twelve-month investigation would be necessary to defend such a charge.

Second, not only does defendant have a right to a speedy trial, so too does the public. (emphasis added) See Bloate v. United States, 130 S.Ct. 1345, 1356 (2010) ("Speedy Trial Act . . . serves not only to protect defendants, but also to vindicate the public interest in the swift administration of justice. . . . [A] defendant may not opt out of the Act even if he believes it would be in his interest; '[a]llowing prospective waivers would seriously undermine the Act because there are many cases . . . in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest.'") (quoting Zedner v. United States, 547 U.S. 489, 502 (2006)).

Third, defense counsel (FPD) in this case also represented Marvin Hall who was sentenced by this Court last Friday, June 25, 2010, to the 24 months "time served" while he was in custody awaiting trial. See United States v. Hall, Criminal No. 08-0215 (Doc. No. 133). The USSG range in that case was 15 to 21 months, with the likely sentence being 15 months based on all of the section 3553(a) factors, 18 U.S.C. § 3553(a), on the record in that case. Unfortunately for Mr. Hall, the FPD had filed 16 motions for extensions of time within which to file pretrial motions (see

> doc. nos. 28, 40, 45, 50, 55, 59, 65, 67, 71, 75, 79, 83, 85, 89, 94, and 98), thus costing Mr. Hall at least nine additional and unnecessary months in prison, with no discernible strategic or other benefit to him and nine months in additional prison costs assessed to the taxpayers.
>
> For all of the above reasons, the Court finds that the granting of the requested stay (Doc. No. 75) would be inconsistent with the public interest.

Memorandum Order (Doc. No. 87) at 1-4.

Had this Court granted the OFPD's motions to stay Mr. Vue's proceedings pending disposition of its writ of mandamus and/or appeals to the United States Court of Appeals for the Third Circuit, it is quite likely that his sentencing would have been delayed an additional 3 to 12 months awaiting that Court's decision.

XI. Motions for Disqualification in 21 of 22 Cases Before this Court Wherein a Defendant Is Represented by an AFPD

A. The Motions for Disqualifications in 21 Unrelated Criminal Cases

On August 31, 2010, the AFPDs assigned to 21 cases before this Court wherein the OFPD has entered an appearance filed a Motion for Disqualification, asking that this Court recuse itself from those cases because of the bias and partiality it perceives from events that took place in the Vue case. None of these motions attach an affidavit from the client, and none of the motions state that any individual defendant was consulted prior to filing the motion or consented to the motion to disqualify this Court.

The motion to disqualify in the Peays case is representative of the identical motions to disqualify filed in 21 cases assigned to this Court in which the OFPD represents a defendant. Each motion to disqualify this Court from the OFPD's cases is entirely predicated on the alleged

bias or lack of impartiality perceived by the OFPD in the Vue case. Each motion to disqualify attached 69 pages of transcript from hearings in the Vue case, and a 64 page document filed in the Vue case. Ironically – and most conspicuously – the only case in which an AFPD represents a defendant before this Court who has not sought to disqualify this Court is the Vue case.

As previously noted, the OFPD's Motions for Disqualification do not allege that this Court lacks impartiality as to any of the 21 individual defendants, nor do said Motions offer any evidence on the record that might demonstrate a lack of impartiality in these cases. Instead, the OFPD perceives a lack of impartiality toward its attorneys, not its clients, based on rulings and statements this Court made expressing its concern with the practice of certain AFPD's filing serial motions for extensions of time within which to file pretrial motions (as in the Hall and Vue cases), and because of this Court's denial of the OFPD's motions to withdraw and for stay of proceedings in the Vue case.

The Court also previously noted that the OFPD withdrew its appeal to the United States Court of Appeals for the Third Circuit from this Court's Orders denying the Motions to Withdraw and its Motions to Stay the Vue proceedings, but then based 21 motions to disqualify the Court in 21 other OFPD represented cases before this Court on those very same Court Orders in the Vue case.

B. The Court's Order in United States v. Peays, 10cr0070

In the Peays case, a final pretrial conference was scheduled for September 1, 2010. The Motion for Disqualification was filed at 4:57 p.m. on August 31, 2010, and it was not accompanied by a motion to continue or postpone proceedings pending resolution of the recusal motion, as it was in the majority of the OFPD cases before the Court. The Court sua sponte

postponed the proceedings in Peays (and in the other cases) for the reasons set forth in its Order Continuing Proceedings Pending Ruling On Motion For Disqualification (Doc. No. 42), which are repeated in their entirety below:

> Yesterday, on August 31, 2010, the Federal Public Defender's Office, through its various assigned Assistant Federal Public Defenders ("AFPDs"), filed Motions to Disqualify [this] Judge in all 21 criminal cases pending before this Court where defendants are represented by an AFPD (except in the United States v. Vue case - - 09cr0048), coupled in most, but not all, cases with Motions to Continue Proceeding Pending Resolution of Motion[s] for Disqualification. This case is one in which a Motion for Disqualification (Doc. No. 42), but not a Motion to Continue, has been filed. The FPD's Office alleges in the Motions to Disqualify that the Court lacks "impartiality" in criminal cases where defendant is represented by an attorney from the FPD's Office.
>
> Although all of the substantive attachments to these Motions are transcripts or FPD filings of record in the Vue case, the FPD's Office has not filed a Motion to Disqualify Judge, nor Motion to Continue, in the Vue case. In its filings, the FPD's Office does not explain why the complained-of actions and/or statements made by the Court (all on the record) in the Vue case requires disqualification in all pending FPD's cases except in the Vue case, the very case on which the FPD's Office bases its complaint.
>
> Further, none of the foregoing Motions state that the individual defendants in these pending cases were consulted and consented in writing to the filing of said Motions to Disqualify this Judge or Motions to Continue or Postpone their cases. In fact, no affidavit was filed by any of the affected defendants, saying that he or she was consulted by their respective AFPD concerning said Motion(s), read said Motion(s), and/or expressly approved the relief requested in said Motion(s).
>
> Thus, since the rights of the individual defendant raises above any institutional interest of the FPD's Office, the Court ORDERS that the AFPD assigned for each said defendant meet face-to-face with said defendant and obtain a signed affidavit stating whether said defendant was consulted, read, and expressly approved the content and the relief requested in said Motion(s) before said Motion(s) were

filed in his or her case. Said affidavits shall be filed on or before September 10, 2010. If counsel needs additional time in a particular case, an appropriate Motion(s) should be filed, and if reasonable, will be granted. These affidavits may be filed under seal, and no attorney-client privileged information shall be disclosed.

This Court having served this District for more than 7 ½ years has consistently been impressed with the zeal and quality of the representation of the AFPDs and counted them as professional colleagues in our great system of justice. However, in two recent cases (United States v. Hall - - 08cr0215, and United States v. Vue -- 09cr0048), where the assigned AFPD appeared to be relatively inexperienced as a trial attorney, Mr. Hall served months more in prison than the high-end of the advisory sentencing guideline imprisonment range, and Mr. Vue has already served above the low-end of the advisory sentencing guideline imprisonment range agreed to by the parties,[[3]] because of numerous and repeated motions for extensions of time to file pretrial motions (16 motions in Hall and 9 motions in Vue). Instead of privately working with its less experienced attorneys, and privately implementing quality control procedures and other best practices relating to the impact of the filing of continual motions for extensions of time in light of the potential sentencing guidelines range, to make sure that such situations never happen again, the FPD's Office blames the Judge. Such conduct does not remedy the dreadful situation of a defendant sitting in prison for more days and months than his or her actual sentence should be. (emphasis added)

The Court will grant any pending Motion to Disqualify, if and when it is established on the record that this request is the personal request of a defendant, as opposed to the desire of the FPD's Office, and the Court will implement an automatic disqualification for all future criminal cases where a defendant is represented by an attorney from the FPD's Office. This automatic disqualification will not include any cases where a defendant is represented by any of the other excellent criminal defense attorneys of our Bar, not actually employed by the FPD's Office.

[3] Mr. Vue's sentencing is scheduled for September 22, 2010.

Accordingly,

IT IS HEREBY ORDERED that all proceedings in this case, including the trial which is scheduled for September 7, 2010, are continued until further Order of Court resolving the Motion for Disqualification.

IT IS FURTHER ORDERED that the extension of time caused by this continuance is excludable delay under the Speedy Trial Act, 18 U.S.C. § 3161 (h)(1)(D) ("delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.").

SO ORDERED, this 1st day of September, 2010

C. United States v. Marvin Hall – 08cr215

In the OFPD's identical Motions for Disqualification, the OFPD disputes this Court's finding that Mr. Hall spent nine or more months in prison than he otherwise would have, had his AFPD (the same AFPD assigned to the Vue case) not sought repeated (16) delays. The OFPD protests that this Court was not privy to what went on behind the scenes, and that through counsel's hard work and investigation, and successful negotiations with the government, the AFPD persuaded the government to drop one of the two counts against Mr. Hall, which in fact reduced by months the likely sentence had that count not been dropped. The Motion for Disqualification states:

> The court's statement was made without knowledge of the FPD's investigative efforts, the extensive plea negotiations, and parties' disputes about the advisory sentencing guidelines range. See Docket Entry No. 93, attached as Exhibit C. Moreover, at no time prior to the Hall sentencing hearing did the court question FPD counsel about the requested extensions and/or seek additional information about the requests before granting additional time. It was not until the FPD sought a stay to allow time for an interlocutory appeal and/or mandamus action in the Vue matter that the court expressed its "concern[ ] about repeated delays

> caused by pro forma defense motions to enlarge time to file pretrial motions to complete investigation of the law and facts, which until recently, this Court (and others in this district) has been quite willing to grant based upon counsel's representations taken at face value."

Motion for Disqualification (Doc. No. 42 in United States v. Peays, 10cr0070), at 7, n.6.

As the OFPD correctly notes, the Court has expressed grave concern "about repeated delays caused by pro forma defense motions to enlarge time to file pretrial motions to complete investigation of the law and facts." With the addition of certain newer AFPDs, this practice (i.e., filing serial motions to extend the time to file pretrial motions based only on boilerplate recitations that the AFPD needs "needs additional time to complete the investigation of the facts and law before . . . [making] an informed decision concerning the filing of pretrial motions) has substantially increased, even in non-cooperation situations. No amount of blaming the government and the Court can excuse a practice that substantially contributes to any defendant unnecessarily spending more days and months in prison than the low end of the advisory guideline range of imprisonment would call for.

As the Court stated at Mr. Hall's sentencing, as part of its reasons for the sentence of imprisonment of time served: "The sentence actually turns out to be 24 months, which is well above the guideline range of 15 to 21 months. For that, I apologize to you. The practice of these extensions of times are increasingly problematic and obviously impacted you. I, sir, probably would have sentenced you to 15 months and you served nine more of that because of the motions for extension of time continually filed in this case. I apologize on behalf of the Court and you can take that matter up with whoever you want, if you wish." Transcript, Hall Sentencing Hearing (Doc. No. 135 at Crim.No. 08-215), at 13-14. The explanation that it took 16 motions to

continue in order to determine that a particular SKS assault rifle (one of the firearms named in count one) did not take a large capacity magazine (which would have triggered an enhancement) and that the exploding golf balls at count two were trick golf balls for entertainment purposes is not convincing. Id. at 9-11.

More importantly, the issue in the Hall case was not whether or not the AFPD did any significant investigation or negotiation in the 18 months of delay caused by the 16 motions for enlargements of time to file pretrial motions and this Court's granting them, but whether said 18 month delay contributed in any way to the prosecution's decision to drop a count of the indictment, which is a fairly common occurrence in this district when a defendant agrees to enter a plea. There is nothing on the record to indicate that the plea agreement reached in December 2009 could not have been negotiated in 2008 or earlier in 2009.

The OFPD repeatedly takes issue with this Court's statements that had it or the Court of Appeals for the Third Circuit granted the OFPD's requests to stay Mr. Vue's proceedings pending disposition of its appeals, it would potentially mean an additional 3 to 12 months incarceration and additional time served above the advisory guidelines range of imprisonment for Mr. Vue. See Motion for Disqualification in the Peays case (10cr0070, Doc. No. 42) at pp. 7-8 n.6, p. 11 and p. 11 n.9, and p. 27 and p. 27 n.18. Specifically, the OFPD affirmatively asserts that, when it sought a stay of proceedings during the pendency of its interlocutory appeal in the Court of Appeals or Emergency Petition for Writ of Mandamus played out, "Mr. Vue's estimated advisory guideline range was 30-37 months, and the 15-21 month range thereafter agreed to by the government was neither on the table nor discussed. Accordingly, at the time the OFPD sought a stay in the district court, it reasonably believed any emergency proceedings in the Court of

Appeals would have been concluded well before the length of Mr. Vue's pretrial incarceration approached the low point of the then-estimated advisory sentencing guideline range." Id. at p. 27 n. 18.

"[W]ithout knowledge of the relevant facts, namely the details of discussions between the parties and the confidential communications between OFPD counsel and Mr. Vue," the OFPD challenges this Court's assessment that the plea agreement with a stipulated range was achieved only because someone other than OFPD counsel (i.e., Mr. Cogan) "finally decided to focus in on this case and represent Mr. Vue in a full, fair and proper manner and begin the determination of whether this case was going to trial or have plea negotiations . . . .' ." Id. At p. 11 n. 9.

The OFPD's factual assertions about the status of plea negotiations at the time it sought to stop Mr. Vue's proceedings are off the record, of course, and are self-serving. Moreover, they are disputed by the government.

In the Government's Response To Defendant's Motion For Disqualification And Motion To Reconsider This Court's September 1, 2010 Order To The Extent It Grants An Automatic Disqualification In All Future Criminal Cases Involving The Office Of The Federal Public Defender filed in the Peays case (Doc. No. 46) and the others, the government "takes issue with the statement in the OFPD's Motion that the guideline range in the Vue case was originally calculated to be between 30 - 37 months and that the '15 - 21 month range ultimately agreed to by the government was then not on the table nor discussed.' Motion, p.11. The [OFPD's] Motion cites no basis for an estimated 30 - 37 [months] range. Moreover, the first time that Vue's counsel was willing to discuss a plea with the government, the government agreed to a guideline range of 15 to 21 months." Government's Response (Doc. No. 46), at 7, n.2. (emphasis added).

XII. Adam Cogan and the Plea Agreement in the Vue Case

On July 8, 2010, only 15 days after he was appointed as additional counsel for Mr. Vue, Mr. Cogan advised the Court that his client wished to change his plea and enter a plea of guilty.

Based upon his experience and skill, Mr. Cogan was able, in those fifteen days, to fully investigate the case, meet and confer with his client, resolve the conflicts situation satisfactorily, recognize that Mr. Vue's period of pretrial confinement was fast approaching the likely sentencing guideline range for imprisonment, negotiate with the government, and reach an agreement to plead guilty with a non-binding stipulation as to an advisory sentencing guideline range of 15 to 21 months. The Pre-Plea Investigation Report (filed August 30, 2010) subsequently confirmed 15 to 21 months imprisonment as the appropriate range under the sentencing guidelines. (Doc. No. 107).

Mr. Vue has been imprisoned since May 21, 2009, so he had already served about 13 and one half months, at the time he changed his plea. Mr. Cogan also advised the Court that defendant was ready to waive a full presentence investigation report and be sentenced on the day he entered his guilty plea, based upon the plea agreement.

By text-only order that same day, the Court scheduled a change of plea hearing for July 15, 2010, and stated that it "will discuss an appropriate date for sentencing at the plea hearing, and also the advisability of conducting a sentencing hearing without a Pre-Sentence Investigation and Report, relying instead on a Pre-Plea Investigation and Report. The Court hereby issues an Order of Referral to Probation for a Pre-Plea Investigation and Report with special focus on criminal and employment history as to Youa Vue." Text-only order of July 8,

2010. See additional scheduling Orders at (Docs. No. 91 and 92).

XIII. OFPD's "Notice of Clarification and Corrections to the Record" (Doc. No. 3), Which Notice Neither "Clarifies" Nor "Corrects" the Record in the Vue Case

At 9:38 a.m. on the morning of July 15, 2010, the day scheduled for the 10:00 a.m. change of plea hearing, his lead AFPD filed a document entitled "Notice of Clarifications and Corrections to the Record." (Doc. No. 93). At 11:10 a.m. that same day, this Court entered a Text Only Order striking (Doc. No. 93) "for failure to cite any rule or law permitting the filing" of such a Notice purporting to correct or clarify the record, and noting that if counsel objected to the Memorandum Order, (Doc. No. 87), Denying Defendant's Motion to Stay Proceedings, the proper procedure would have been an appeal to the United States Court of Appeals for the Third Circuit. ECF Docket, July 15, 2010.

The Court also advised counsel in open court that it would entertain a motion to clarify or correct the record in the Vue case, and requested counsel to provide legal authority in the rules of criminal procedure or elsewhere for such motion. To date, the OFPD has not filed a motion for leave to file its "Notice," and although (Doc. No. 93) has been stricken from the record in the Vue case by Order of Court, the OFPD nevertheless attached the immediately stricken "Notice" to each of its 21 Motions for Disqualification in the 21 other cases before this Court.

Subsequently, this Court filed a Memorandum Opinion explaining why it struck this unauthorized and self-serving Notice, which is repeated below in most relevant part:

> The [OFPD'S] document entitled "Notice of Clarifications and Corrections to the Record" ["OFPD Notice"] is in fact neither a clarification nor a correction to the record in Mr. Vue's case.

> Rather, the [OFPD Notice] consists of (i) the unverified statements of counsel, with no supporting affidavits, about extraneous matters regarding the [OFPD]'s representation of Mr. Vue that did not occur in open court and were not part of this record, Doc. No. 93 at 1-3; and (ii) statements regarding the guilty plea and sentencing in an unrelated case (about facts on and extraneous to the record in that case) that this Court referenced in its Memorandum Order, Doc. No. 87, denying Defendant's Motion to Stay Proceedings at Doc. No. 75, Doc. No. 93, at 3-14, with two transcripts attached from the record in that other case. The Court's reference to United States v. Marvin Hall, Criminal Action No. 08-215, Doc. No. 87, at 4, 20-21, in support of not granting the [OFPD]'s motions to withdraw from the case and further delay Mr. Vue's trial, was to illustrate the serious speedy trial and due process problems caused by the Court's granting this AFPD's numerous motions for enlargement of time to file pretrial motions, Doc. No. 93, at 3-14, and the detriment that can befall defendants where those repeated continuances result in serving more time imprisoned than the term of imprisonment calculated under the advisory guidelines. (emphasis added).
>
> Because the[O FPD Notice] is neither a correction nor a clarification of the record in Mr. Vue's case, it has no bearing on Mr. Vue's guilty plea or sentencing, but that was not immediately apparent. By not filing the document as a Motion, the AFPD did not provide the government the opportunity to respond or this Court the opportunity to consider the matter and make an informed decision. (emphasis added). Moreover, the last minute filing (some 22 minutes before the change of plea hearing commenced) set forth nothing relevant or material to Mr. Vue's change of plea, and in fact, Mr. Vue had not authorized or been consulted with respect to this document and had not seen it until he arrived in court for the change of plea hearing.[4] (emphasis added). . . . Ultimately, defendant and additional counsel determined it did not impact his decision.
>
> Given that the [OFPD Notice] pertains primarily to matters on and extraneous to the record in the Hall case, given that the [OFPD] announced its intention to seek a writ of mandamus in the United States Court of Appeals for

[4] There is no indication on the record that the attorney has consulted with the client before seeking a continuance.

the Third Circuit to stay these proceedings pending the Court of Appeals' resolution of its mandamus challenge to this Court's orders denying permission to withdraw from the case, and given that the [OFPD] has appeared in this Court twice represented by independent counsel, see Docs. Nos. 85, 86 and 99, it seems fair to conclude that the [OFPD]'s Notice of Clarifications and Corrections to the Record is not intended to clarify or correct the record in Mr. Vue's case. (emphasis added).

II. Background

* * *

. . . Turning to this case, this Court granted eight pro forma motions to enlarge the time to file pretrial motions before denying the ninth. Counsel for the Government notes, in its opposition to the motion to stay (Doc. No. 80, p. 1) its belief that defendant has "relatively limited sentencing exposure," and that if a stay were to be granted upon defense counsel's motion, then defendant and the public might be presented with a situation where the defendant spends more time than he would have had he gone to trial and been convicted or plead guilty many enlargements of time ago. Obviously, the detriment to defendant would be greatly magnified if, in fact, he were to be acquitted at trial. (emphasis added).
Doc. No. 87, at 20-21.

The foregoing quotation is the ostensible reason necessitating the [OFPD Notice] in this case. It consists of this Court's observation of the speedy trial problems caused by the recurring practice of numerous continuances for non-specific reasons, and illustrated by references to Mr. Hall's case. The [OFPD Notice] sets forth the [OFPD]'s difference of opinion and its argument as to why this Court's analysis of Mr. Hall's situation is wrong.

The [OFPD], like all counsel before this or any Court, is expected to vigorously defend its clients and is entitled to its opinions and may make any arguments it deems appropriate (within bounds of professionalism and rules of procedure and professional conduct, of course), but

> the [OFPD]'s opinions and arguments are not facts of record, notwithstanding that they are placed in a document called "Notice of Clarifications and Corrections to the Record." That is why the Court struck the [OFPD] Notice from the record in this case.
>
> If the [OFPD] in its professional opinion believes that the Court's Memorandum Order Denying Defendant's Motion to Stay Proceedings is erroneous, it should follow the proper procedure and file an appeal or seek a writ of mandamus as previously announced, not an unauthorized statement of fact purporting to "correct" or "clarify" the record. (emphasis added).

Memorandum Opinion, July 28, 2010 (Doc. No. 101), at 2-9.

XIV. The Change of Plea Hearing

At the change of plea hearing on July 15, 2010, the OFPD again appeared with counsel present to advocate its institutional interests. Mr. Cogan appeared to advocate Mr. Vue's interests.

With regard to whether this Court could or would instantly sentence Mr. Vue on July 15, 2010, without a presentence report, based on the plea agreement between the parties, the following exchanges took place before and after defendant entered his plea of guilty:

> MR. COGAN: Your Honor, while Mr. Vue is reviewing this document [i.e., the Notice filed at (Doc. No. 93)], I had acquired the prior presentence report that was rendered in conjunction with Mr. Vue 's prior federal criminal case [from the 1998 conviction and sentencing] as well as what I believe to be the extent of his criminal history documents. I could supply these to the Court for the expeditious handling of this Court's resources, if you would like to review them potentially now. If you don't, I understand, sir.

THE COURT: I . . . would suggest that you provide them to the individual in the probation office and the presentence office that's preparing the pre-plea sentence investigation and report which can be done much quicker than the longer form so that I can schedule a sentencing as soon as that document is done.

I believe in light of some issues in the criminal history in the past, some of which may be dated, that I would like to have, and I think it's wise for the public interest, to have a summary report from the probation office in light of the desire to do this sooner rather than later of the defendant. I've asked for them to do a much shorter and more quickly prepared pre-plea sentence investigation report as opposed to the longer one which takes about six months.
. . .

As to sentencing today, I'm unprepared to do that because I don't believe there's sufficient information on the record for me to make an informed decision. I . . . think for the public good, that seeking a pre-plea investigation, pre-plea presentence investigation report is the wisest and quickest way to join the sentencing issue. . . .

* * *

THE COURT: . . .

Before we set the hearing date, there are a couple of things I wanted to put on the record.

First of all, sir, this morning we spent some time discussing and reviewing Document No. 93 which was filed by the Federal Public Defender's office this morning. You did have adequate time to review that document in its entirety, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And adequate time to discuss that document with your attorney, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is that correct, counsel?

MR. COGAN: Yes, Your Honor.

THE COURT: . . .

. . . Secondly, Mr. McGough asked me to consider a matter of recusal from Reed Smith cases. In light of reviewing the record, his statement, I will review that and will not recuse myself (emphasis added), but I will consider disclosing that matter at a status conference with the current one Reed Smith case I have.

Third, I wanted to make it clear that the focus should be at all times in this case on Mr. Vue and his rights, and protection of his rights. (emphasis added)

Next, our research seemed to indicate that I continue to have jurisdiction despite the two appeals. Have those two appeals been dismissed over the lunch hour?

MR. COGAN: Your Honor, I don't believe they have, but they are in the process of being dismissed as I understand it, Your Honor. . . .

THE COURT: Lastly, I wanted to explain my reasons for not providing an instant sentencing today that's been requested.

I have already stated before that we've shifted from many motions for extension of time, appeals to the Third Circuit, motions for stay and then . . . wanting to go to an instant guilty plea and sentencing. I do not believe that even with what is already on the record that I can fulfill my duty to the public in making a sentence today.

I think it's important in light of the history of this defendant for us to determine exactly what that history is, and it's a serious history, even though it is more than ten years old, and the nature of this particular crime and the

> facts that I heard at the suppression hearing that were brought forth, so, I need to reflect on the seriousness of the crime. I have to think about respect for the law and what is just punishment in this case, especially since the agreed to but nonbinding sentencing range is substantially below the statutory range. I want to wrestle through those particular issues, including what would be an adequate deterrence and what would be fair to the defendant but also fair to protect the public. And to the extent that there's now a delay of probably two months, that I regret, that delay, but I've done everything I can to move this case along, including denying the ninth motion to continue, including setting down a trial date promptly, including denying the motion to stay.
> So I'd ask you all get your calendars out, please.
>
> * * *
>
> THE COURT: I also want to hear from counsel, and I think it's important to hear from counsel initially in writing your reaction to the pre-plea sentence report and the factors I need to consider in rendering a fair and just sentence.
>
> So, hearing no objection, the sentencing hearing will be September 22nd, 2010 at 9:30 a.m.

Transcript, July 15, 2010, Change of Plea Hearing (Doc. No. 100) at 10-12, 52-55.

XV. Request for Bond Pending Sentencing

After Mr. Vue had entered his plea of guilty, Mr. Cogan requested that his client be released on bond, inasmuch as his time served was fast approaching the agreed upon advisory sentencing range of 15 to 21 months. The government objected to presentence release because he previously had "absconded in a rather blatant way." Id. at 56.

In light of Mr. Vue's conduct while on pretrial release (absconding to Michigan) and his substance abuse problems, this Court was uncomfortable with presentencing release, and denied

this request for bond for the reasons stated on the record: first, because "the mere fact that the [parties] have stipulated to an advisory guideline range is not binding on this Court," and second, because Mr. Vue made statements to Task Force Officers upon his arrest to the effect that he did not have time to get to his AK 47. Id. at 56-57. Under all of these circumstances existing at that time (including no current pre-sentencing investigation and report), Mr. Vue was simply not a candidate for presentence release on bond and this Court would have been uninformed and remiss in releasing him on bond pending sentencing at that time and on that record.

However, after consulting with counsel and the probation office about the necessary time to complete at least a preliminary report, the Court directed an expedited presentence investigative report from the Probation Office which was to concentrate on criminal and employment history, and scheduled a hearing for September 22, 2010, which is several months shorter than the probation office generally requires to conduct its investigation in full and prepare a report.

The Court did entertain defendant's Motion for Temporary Release on Bond to Attend a Family Member's Funeral (Doc. No. 102), filed by Mr. Cogan, which the government did not oppose. After a brief hearing, on July 29, 2010, the Court granted temporary release on bond for Mr. Vue to attend funeral services for his younger brother, Teng Vue, who tragically drowned in an accident in Minnesota, and family functions preceding the services, and released him into the custody and care of his sister, Ly Vue. (Doc. No. 104, 105).[5]

[5] Mr. Cogan educated the Court that Teng Vue would receive "a cultural funeral pursuant to Hmong custom," and that a "Hmong funeral lasts from one to several days, depending on the age and the social and economic standing of the deceased person and his or her family." Motion for Temporary Release on Bond (Doc. No. 102), at 3.

XVI. Appeal to the United States Court of Appeals for the Third Circuit

During all of this, on June 29, 2010, the OFPD filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit from this Court's four Orders on its motions and supplemental motions to withdraw as counsel and to stay Mr. Vue's proceedings, and advised this Court that it also was seeking a Writ of Mandamus from the Court of Appeals. The OFPD vigorously argued that this Court should stay all criminal proceedings – further delaying Mr. Vue's day in court or, as it turned out, his negotiation of a favorable plea – pending resolution of its appeal. The OFPD's appeal remained pending in that Court until August 18, 2010, when the Court of Appeals granted the Federal Public Defender's unopposed motion to dismiss the appeal without prejudice, which motion had been filed the previous day.

Until the OFPD filed its motion to dismiss the appeal on August 17, 2010, a serious jurisdictional issue hung over the district court proceedings. The Court questioned whether this Court had jurisdiction to proceed to sentencing while issues the OFPD asserts are interrelated to the entire proceeding remained in that Court. The answer is not free from doubt, which is why this Court requested the parties to file respective positions with respect to the Court's continued jurisdiction, see Order of July 16, 2010 (Doc. No. 98), and why the OFPD has vacillated on the question. Compare First Motion to Stay proceedings (Doc. No. 75) (OFPD taking position that Court of Appeals did not have jurisdiction over interlocutory appeal, and stating that the OFPD intended to file a writ of mandamus to stay the proceedings), with Supplement to First Motion to Stay Proceedings (Doc. No. 79) (OFPD taking position that "an interlocutory appeal does in fact lie in the Court of Appeals," and that a stay was required because the interlocutory orders were of the type that would evade review if the interlocutory appeal was not heard and the proceedings

below stayed until then).

In its motion to dismiss the appeal, the OFPD maintained that "an appeal of the district court's orders were properly brought before this Court by way of an interlocutory appeal. See United States v. Oberoi, 331 F.3d 44 (2d Cir. 2003) . . . . The withdrawal of the appeal, however, serves to protect Mr. Vue's substantial interests in being released from custody as soon as possible." Unopposed Motion to Dismiss at ¶ 11, United States v. Vue, No. 10-2932. Thus, the OFPD finally realized that "a stay of the district court proceedings would likely operate to Mr. Vue's detriment." Id. at ¶ 10. Despite its belated realization, this Motion to Dismiss the appeal was not filed until another month had elapsed. (Mr. Vue's entry of a plea of guilty based on the plea agreement negotiated by Mr. Cogan with the government, took place on July 15, 2010).

XVII. The Expedited Sentencing and Presentence Report

On August 30, 2010, the Probation Office submitted (under seal) its "Pre Plea Investigation Report" ("Report"). (Doc. No. 107). On September 1, 2010, defendant and the government each submitted their respective Positions With Respect To Sentencing Factors (Docs. No. 108, 109). While defendant took issue with some of the information contained in the Report, neither he nor the government filed any objections that would impact the advisory guideline sentencing calculation, and both parties agreed with the Probation Office that Mr. Vue's Total Offense Level is 12 and that his 4 criminal history points place him in Criminal History Category III, yielding a range of imprisonment of 15 to 21 months, as agreed by the parties. As of September 22, 2010, defendant will have

been in custody on pretrial detention for approximately 16 months.

XVIII. Government's Response to OFPD's Motions for Disqualification in the 21 Unrelated Criminal Cases; and Government's Motions to Reconsider

The government filed on September 3, 2010, the Government's Response To Defendant's Motion For Disqualification And Motion To Reconsider This Court's September 1, 2010 Order To The Extent It Grants An Automatic Disqualification In All Future Criminal Cases Involving The Office Of The Federal Public Defender filed in the Peays case (Doc. No. 46), as well as in the other cases wherein an AFPD represents a defendant before this Court.

The government zealously argues that this Court must not recuse itself from all OFPD cases based on "statements and judicial rulings in United States v. Vue, Docket No. 09-48 (where a Motion for Recusal was not filed)" under the prevailing legal standards for recusal under Title 28, United States Code, Section 455, which governs the disqualification of federal judges. Government's Response in Peays (Doc. No. 46), at 2-3 (citing, inter alia, United States v. Wecht, 484 F.3d 194, 213 (3d Cir. 2007)).

The government maintains that the legal standards for recusal are not met even in the Vue case (which the OFPD uses as the basis for disqualification, even though it does not move to disqualify this Court in Vue), since the only conduct complained of involves rulings on the record in writing or statements made in open court in the Vue case. More importantly, the government argues that the records in the 21 cases in which the OFPD has filed motions to disqualify do "not reflect the type of 'deep-seated antagonism' or

'bias' that would warrant recusal under § 455(a). Indeed, [the individual defendants reference] no statements whatsoever that relate to the instant proceeding that would indicate that this Court has any bias against Defendant . . . in the present matter. Rather, Defendant points at length to comments made by this Court in United States v. Vue, 09-48, and to a limited extent, in United States v. Hall . . . ." Id. at 5.

The government's Response further argues that the OFPD's position is undermined by the fact that it did not file a Motion for Disqualification in the Vue case. As the government asserts, the "purpose of §455(a) is to promote confidence in the judiciary by avoiding the appearance of impropriety whenever possible. . . . It is difficult to understand why the FPD believes that comments made by this Court in Vue create an appearance of impropriety in the present case when the FPD tacitly admits, by not moving to recuse in Vue, that the same comments did not create a problem in Vue." Id. at 8.

XIX. OFPD's Motions for Disqualification – The Court Ordered Affidavits

In the Order entered by the Court in the 21 unrelated cases on September 1, 2010, the Court states as follows:

> Further, none of the foregoing Motions state that the individual defendants in these pending cases were consulted and consented in writing to the filing of said Motions to Disqualify this Judge or Motions to Continue or Postpone their cases. In fact, no affidavit was filed by any of the affected defendants, saying that he or she was consulted by their respective AFPD concerning said Motion(s), read said Motion(s), and/or expressly approved the relief requested in said Motion(s).

> Thus, since the rights of the individual defendant raises above any institutional interest of the FPD's Office, the Court ORDERS that the AFPD assigned for each said defendant meet face-to-face with said defendant and obtain a signed affidavit stating whether said defendant was consulted, read, and expressly approved the content and the relief requested in said Motion(s) before said Motion(s) were filed in his or her case. (emphasis added). Said affidavits shall be filed on or before September 10, 2010. If counsel needs additional time in a particular case, an appropriate Motion(s) should be filed, and if reasonable, will be granted. These affidavits may be filed under seal, and no attorney-client privileged information shall be disclosed.

On September 11, 2010, the OFPD filed documents at each of the 21 cases.

A. The "Basic" Responses and Affidavits in 17 Cases

In 17 of the 21 cases, the assigned AFPD submitted a terse "Response to September 1, 2010, Order of Court," with each Response attaching one exhibit docketed, intriguingly, as "Exhibit D." Exhibit D is an Affidavit signed by the defendant in each of these cases using identical language. See, e.g., United States v. Cunningham, 07cr0298 (Doc. No. 207 and 207-1). This carefully phrased response and accompanying affidavit state the following:

> AND NOW, comes the defendant . . . , by his attorney . . . , Assistant Federal Public Defender, and files this Response to September 1, 2010, Order of Court.
>
> 1. On September 1, 2010, this court issued [the above referenced] Order . . .
>
> 2. The court also . . . ordered that counsel obtain an affidavit from the defendant and submit it by September 10, 2010. Id. at 2.
>
> 3. Without waiving any objection to the requirement that Mr. Cunningham be required to submit an affidavit as a condition precedent to the court's decision to grant the Motion for Disqualification,[FN 1] and in an effort to comply with this court's

order, counsel hereby submits Mr. Cunningham's affidavit as Exhibit D.

Respectfully submitted,

[FN1] The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process. Maine v. Moulton, 474 U.S. 159, 170 (1985); United States v. Wade, 388 U.S. 218, 224 (1967). That right confers on a defendant in a criminal case an absolute right to consult with his lawyer before offering testimony. Perry v. Leeke, 488 U.S. 272, 281 (1989). The court's order directing counsel to obtain and file an affidavit from the defendant in this case, impinges on the Sixth Amendment right to counsel because it strips the defendant of the ability to obtain meaningful advice from counsel. Indeed, the court's order effectively eliminates counsel from the equation, thereby leaving the defendant unrepresented at this critical stage.

The Fifth Amendment, by its terms, prevents a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Although the Fifth Amendment protection is generally limited to situations involving compelled self-incrimination, and the substance of the attached affidavits does not contain incriminating statements, criminal defendants should not be compelled to state their personal views about disqualification, as such statements could result in harm to the defendant if the court were to ultimately deny the request.
Not only does the court's affidavit requirement impinge upon the defendant's right to counsel and to remain silent, an affidavit demonstrating client consent to the motions for disqualification is not legally required. It is well-settled that an attorney need not consult with the client on "'every tactical decision.'" Florida v. Nixon, 543 U.S. 175, 187 (2004) (quoting Taylor v. Illinois, 484 U.S. 400, 417-18 (1988)). Indeed, "an attorney has [the] authority to manage most aspects of the defense without obtaining his client's approval." Id. (citing Taylor, 484 U.S. at 417 -418). The attorney has authority "as to what arguments to pursue, . . . what evidentiary objections to raise, . . . and what agreements to conclude regarding the admission of evidence[.]" New York v. Hill, 528 U.S. 110, 115 (2000). This division of authority between attorney and client is also reflected in the Pennsylvania Rules of Professional Conduct. In the criminal context, the client retains the

> ultimate authority on the central matters of the "plea to be entered, whether to waive jury trial and whether the client will testify." Pa. R. Prof. Conduct 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

United States v. Cunningham, 07cr0278 (Doc. No. 207) (in its entirety).

The Affidavit attached to each of these states, in its entirety:

> 1. I am [defendant's name], the defendant in the above-captioned case.
>
> 2. I have read the court's September 1, 2010, order and do hereby affirm that it is my personal request and desire that the court disqualify itself from my case.
>
> 3. My lawyer, Assistant Federal Public Defender [AFPD's name], discussed the Motions for Disqualification and for Continuance with me before the motions were filed on August 31, 2010. (emphasis added).
>
> 4. I did not and do not object to the filing of the motions. I declare under the penalty of perjury that the foregoing is true and correct.

Exhibit D to Response to September 1, 2010, Order of Court (Doc. No. 207-1).

The Responses and Affidavits do not unambiguously state that the clients gave prior consent to Motions for Disqualification being filed in their cases, nor that the AFPD met with his or her client "face-to-face," as required by the September 1, 2010 Order of Court. Instead, they state with evident precision that the defendant discussed the matter with his or her respective AFPD prior to August 31, 2010, did not object then or now to said Motion, and that it is the defendant's personal request and desire that this Court disqualify itself. Perhaps inadvertent, perhaps artful drafting, either way the Affidavits do not state "whether said defendant was consulted, read, and expressly approved the content and the relief requested in said Motion(s)

before said Motion(s) were filed in his or her case." The Court will not quibble about whether these affidavits and responses comply with the Court's Order, however, because each does in fact indicate that the individual defendant was consulted beforehand and agrees with the OFPD's moving to disqualify this Court from his or her case.

As to the OFPD's contention that a client's consent is not necessary, as set forth in the OFPD's footnote 1, the footnote offers only generalities, and supplies no context or particulars. Thus the OFPD asserts that this Court's Order of September 1, 2010 "impinges on the Sixth Amendment right to counsel because it strips the defendant of the ability to obtain meaningful advice from counsel," and that it "effectively eliminates counsel from the equation, thereby leaving the defendant unrepresented at this critical stage." It is difficult to understand how this Court's Orders to obtain and file Affidavits stating "whether said defendant was consulted, read, and expressly approved the content and the relief requested in said Motion(s) before said Motion(s) were filed in his or her case" "strips the defendant" of anything, or "effectively eliminates counsel from the equation." Such vague and non-specific statements do not assist this Court in making reasoned and informed decisions. Offering platitudes in lieu of record facts and specific statements about any alleged harm to the attorney-client relationship does not make for serious discussion of the issues or informed decision making.

Legally, the OFPD's Fifth and Sixth Amendment arguments and citations of authority are simply statements of black letter constitutional law, but for the most part, the authority relied upon is a legal non sequitur. That is, the black letter law is solid and is not in dispute, but it has little to do with the specific issues raised herein regarding the OFPD's Motions to Withdraw as counsel and Motions to Stay proceedings in the Vue case, which is the OFPD's cornerstone, if

not the entire foundation, for its Motions for Disqualification in 21 unrelated criminal proceedings.

B. Other Four (4) Responses and Affidavits – No Client Consent Prior to Filing Motion for Disqualification

In four other cases, the OFPD filed an identical or substantially similar Response to September 1, 2010, Order of Court, but with a significant variation in the Affidavits, which are again docketed as "Exhibit D." (There are no Exhibits A, B or C attached to any of these Responses.) (e.g., United States v. Pieree Johnson, 04cr0137, (Doc. No. 76-1); United States v. Timothy Sunday, 08cr0393, (Doc. No. 63-1); United States v. Antwon Williams, 09cr0254, (Doc. No. 55-1); United States v. Valerie Manzella, 05cr0289, (Doc. No. 75-1). In these four cases, the Motions for Disqualification were filed without the prior consent of the client.

C. Miscellaneous – OFPD's Planning of the Disqualification Motions Process

1. The Peays case, 10cr070 – October 16, 2010.

In the Peays case, the assigned AFPD filed a Motion To Extend Deadline For Filing Affidavit because of logistical problems within the Pennsylvania Department of Corrections facilities and defendant's transfer from one facility to another. (Doc. No. 47, 10cr70). The Court granted that motion, which indicates that the AFPD discussed the matter of disqualification on August 16, 2010, id. at ¶ 2, and that Mr. Peays approved the filing of the Motion for Disqualification, but not a Motion to Continue his trial.

The ECF docket entries show that the government and this Court continued to prepare for the trial scheduled for September 7, 2010, and held a preliminary pretrial conference on August 27, 2010, yet the AFPD never mentioned the OFPD's plan to file a Motion for Disqualification in

Peays and 20 other cases. The Court did not learn about the Motions for Disqualification until they were filed, on August 31, 2010 at 4:57 p.m. in Peays case. The Response and Affidavit in Peays was filed on September 15, 2010 (Doc. No.50 and 50-1). The affidavit follows the form of the "basic" affidavits.

2. The Kristen Hall case, 10cr0165 – August 18, 2010.

The Court received Ms. Hall's records (electronically) from the United States District Court of Colorado, where the four count indictment originated. Shortly thereafter, on March 1, 2010, an AFPD was appointed by Order of United States Magistrate Judge Bassoon. (Doc. No. 6). The AFPD became actively involved in the case and, working with the United States Attorney for the District of Colorado, reached a plea agreement which is very elaborate and detailed. Obviously, the AFPD acquired a great deal of information, met and formed a positive relationship with his client, and was actively involved in the case from March 1, through August 18, 2010.

On August 13, 2010, Ms. Hall's Consent to Transfer pursuant to Rule 20 was apparently docketed in the District of Colorado, and electronically docketed in this Court on August 17, 2010. (Doc. No. 20). Magistrate Judge Bassoon issued a Notice of Arraignment in the early morning of August 18, 2010, and at 2:36 p.m. that afternoon, a CJA panel attorney filed a "CJA 20" Appointment form and entered his appearance. The panel attorney, in response to a direct question, answered candidly that he had been contacted by the appointed AFPD on August 18, 2010, according to his notes, because in the very near future, the OFPD planned to move to withdraw their appearance in all Judge Schwab cases. Later he learned that the OFPD intended to move to disqualify this Court in all of its cases.

At that point, the AFPD, who was thoroughly familiar with the case having negotiated a comprehensive and unusually detailed (compared to this District's norm) plea agreement, was still attorney of record, yet he did not file a "written petition stating reasons for withdrawal," stating grounds or good cause, nor did he seek "leave of Court," as required by our Local Rules of Criminal Procedure. Inexplicably, without any explanation or showing of good cause, and without seeking leave of Court, the OFPD unilaterally substituted private counsel on August 18, 2010, even though the AFPD had already done most of the work, and even though new counsel had to duplicate some of that work at additional expense to the taxpayers.

3. The Antwon Williams case, 09cr0254 – OFPD Obtains Affidavit Without Informed Consent.

Mr. Williams entered a plea of guilty to one count of possession with intent to deliver heroin on May 5, 2010, and a sentencing hearing was scheduled for October 29, 2010. This Court's Order of September 1, 2010 required, inter alia, a "face-to-face" meeting between AFPD and client so as to ensure that the client understood the nature of the motion and the implications of disqualifying the presiding judge (i.e., potential delay, etc.) and make an informed decision about whether he agreed to accept the consequences of such a motion. The AFPD's Response was of the "basic" variety, which purported to have made an "effort to comply with this court's order." The Affidavit was also of the basic variety, i.e., it says he consents to the Motion for Disqualification and "did not object" when he discussed it with his attorney, but it does not unambiguously state that he gave prior consent to the Motions for Disqualification being filed on his behalf, nor that the AFPD met with him in person.

Recently, this Court received a handwritten letter from Mr. Williams, which has now been docketed at 09cr0254, which states in most pertinent part:

> I Antwon D. Williams, on 9-9-10 received a phone call from my Federal Public Defender (Thomas Livingston). I am being held at Northeast Ohio Correctional Center. I try to keep up with my case and what [is] going on around me. There [there are] some things that's [that are] going on that I don't understand and need a better understanding on. On 9-6-10 I was called for a packet from staff member. It was on cancelling hearing (sentencing) plus the Motion for Disqualification with citation to Authority. From the start me and my lawyer was [were] not seeing eye to eye because he [AFPD] was extending my motion without my consent. Now I'm hearing that you don't agree with the PD putting in all them extended motion[s]. I get this all on the phone which I still don't fully understand (which leave me stuck between a rock and a hard plate [place]). I don't agree on what the FPD counsel is doing just to get more money but there [are] some things I don't agree with on the Judges be [are] doing. I think you could really be a fare [fair] Judge. Then it's like the understanding I'm getten [getting] from his [him] is it would be a conflict of interest (this is my life). The FPD have too many cases that they take on and don't have time to do the right investigation. I don't understand how you went to a fare [fair] Judge to all of a sudden such a bad Judge to the PD. I guess it [it's] just not for me to understand. I don't understand how they charge me with distribute [distribution] when it should have been possession. I don't understand how my charge only carry [carries] up to 60 months then they charge me as a career offender then hit me with the 851 just because they can. [AUSA]. Livingston told me you don't have to go with that. I tell him to look into this case U.S. v. Longshore 644 F.Supp. 2d 658 (D.Md. 2009) fighting the career offender which he never got back to me. He tell [tells] me things but most of the time I never have [a] full understanding. I signed some paper that affidavit but I'm not sure of what that mean[s] because I'm not saying I want you off my case because I think you could be fare [fair]. I just don't understand because it's like he [is] saying you can be unfare [unfair] because of what yall [all of you] are going through.

> I would like to hear from you to have a better understanding. Thanks for your time. Have a nice day. (emphasis added).
>
> I just didn't have a [an] understanding. I wouldn't mind you as the Judge in my case. All I could ask is just be "fare" ["fair"]. I would say this in front of you with my lawyer. (emphasis added).

Given the obvious inconsistency between the Affidavit filed on defendant's behalf by his AFPD (Doc. No. 55-1 at 09cr0254) and Mr. Williams' letter to this Court, it is apparent that Mr. Wiliams, at a minimum, did not understand what he was signing or the implications of the Motion for Disqualification. (The current record does not reveal whether other affected defendants likewise did not understand the OFPD's actions.) The Court will schedule a hearing to clarify the record regarding Mr. Williams' consent. Additional counsel will be appointed for Mr. Williams for purposes of advice and representation at that hearing.

XX. Merits of Disqualification Motions

A. Legal Standards on Motions For Disqualification

Section 455(a) provides that "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Unlike Section 144, which requires recusal whenever a timely and legally sufficient affidavit is filed demonstrating that the presiding judge subjectively harbors a personal bias or prejudice against or in favor of a party, 28 U.S.C. § 144, the inquiry under section 455(a) is "whether the record, viewed objectively, reasonably supports the appearance of prejudice or

bias ." United States v. Pungiatore, 2003 WL 22657087, *4 (E.D.Pa. 2003) (quoting SEC v. Antar, 71 F.3d 97, 101 (3d. Cir. 1995)).

The test is whether a reasonable person, knowing all of the circumstances of record, would harbor doubts about the judge's impartiality. In re Prudential Ins. Co. of Am. Sales Practice Litig., Agent Actions, 148 F.3d. 283, 343 (3d Cir.1998); United States v. Antar, 53 F.3d 568, 574 (3d Cir. 1995); United States v. DiPasquale, 864 F.2d 271, 279 (3d Cir. 1988).

The United States Court of Appeals for the Third Circuit has long held that under section 455(a), "only extrajudicial bias requires disqualification." Johnson v. Trueblood, 629 F.2d 287, 290-91 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981). The Court defined extrajudicial bias as "bias that is not derived from the evidence or conduct of the parties that the judge observes in the course of the proceedings." Id. at 291. Court rulings should not be a basis for a section 455(a) motion both because they can be corrected on appeal, *see id.*, and because "[d]isagreement with a judge's determinations certainly cannot be equated with the showing required to so reflect on his impartiality as to dictate recusal." Jones, 899 F.2d at 1356.

The United States Supreme Court cited the Trueblood case with approval in holding that the extrajudicial source rule applies not only to the bias and prejudice grounds for recusal of sections 144 and 455(b)(1), but also to the catch-all provision of section 455(a). Liteky v. United States, 510 U.S. 540, 547-48 (1994). The Liteky decision summed up the application of the extrajudicial source rule as follows:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See United States v. Grinnell Corp., 384 U.S., at 583, 86 S.Ct., at 1710. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances

> evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

510 U.S. at 555 (emphasis added.)

As the United States Supreme Court subsequently explained, the key to application of the "reasonable observer standard" for judging recusal motions is that the judge's impartiality must not be assessed in disregard of the actual facts of record, but instead must be viewed from the perspective of a reasonable observer having knowledge of all of the facts of record. Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., Inc., 535 U .S. 229, 233 (2002).

The case of Samuel v. University of Pittsburgh, 395 F.Supp. 1275 (W.D. Pa. 1975), vacated on other grounds 538 F.2d 991 (3d Cir. 1976), is instructive. In the Samuel case, parties who successfully challenged Pennsylvania state universities' rule by which residency of married female students, for purposes of tuition, was determined by looking to residency of their husbands, moved for disqualification of the District Judge and for attorney fees. Counsel filed a motion and affidavit stating that the United States District Judge was irrevocably prejudiced towards its law firm and attorneys and the immediate client in the case, as well the other similarly situated state universities. Samuel, 395 F.Supp. at 1278. These allegations stemmed from comments made to the parties both on and off the record during proceedings, private

conversations supposedly overheard and decisions rendered in other, entirely unrelated cases. Id.

Bias against an attorney may be grounds for disqualification where hostility is so virulent and of such magnitude that it prejudices the judge against attorney's client. See Conklin v. Warrington Tp., 476 F. Supp. 2d 458 (M.D. Pa. 2007). However, as Samuel holds, the movant's burden of proving a disqualifying level of prejudice is steep, and requires much more than dissatisfaction with the Court's rulings and on the record statements:

> Nothing in [Section 455] should be read to warrant the transformation of litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Samuel, 395 F.Supp. at 1277.

Further, a judge cannot be deemed biased against an attorney that the judge rebuked or admonished, even if the scolding was abrasive and not particularly tactful. As the Court of Appeals for the Third Circuit has stated, a district court's statements about counsel's contumacious behavior do not demonstrate bias against the attorney or the client. Com. of Pa. v. Local Union 542, Intern. Union of Operating Engineers, 552 F.2d 498, 514 (3d Cir.), cert. denied 516 U.S. 915 (1977) ("judge's description of appellant's conduct was neither acid nor sarcastic; it was simply accurate. . . . Appellant mistakes judicial disapproval for personal pique. A judge who objectively expresses his antipathy toward contumacious conduct does not thereby disqualify himself from adjudicating the contempt . . . .").

In Blanche Rd. Corp. v Bensalem Twp., 57 F.3d 253 (3d Cir.), cert. denied 516 U.S. 915 (1995), the United States Court of Appeals for the Third Circuit held that the district judge did

not abuse his discretion by refusing to recuse from a second trial because of comments made at the first trial which, in movants' perception, showed the judge's bias and hostility to the attorney. The Court's "offending" comments included that counsel had "maneuvered" to ensure the appearance of a witness and that plaintiffs' counsel "conducted the worst direct examination the court had ever seen," and comments indicating the judge was skeptical of plaintiffs' witnesses. The Court of Appeals held, after reviewing the entire record for the precise context, that the district judge's actions and statements did not demonstrate "the type of bias warranting his recusal from the case. Although it is true that at times the judge criticized plaintiffs for attempting to mislead the jury and became short-tempered with plaintiffs' counsel, these comments appear to arise from the judge's impatience and frustration with the manner in which plaintiffs were trying their case, rather than any partiality for defendants." Id. at 57 F.3d 266 (citing Liteky and United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994)).[6]

B. Analysis

The Court finds no merit to the OFPD's claims that this Court's rulings or statements made in open court in the Vue and Hall proceedings somehow reveal antagonism, bias or lack of impartiality toward the Office of the Federal Public Defender or any AFPD in particular, much less to any of their clients.

First, the OFPD is in the unique position of arguing that the Motions to Disqualify should be granted because of the Court's purported lack of impartiality as to the attorneys of the OFPD, but not as to any of their clients - - not as to any of the 21 defendants in which a Motion for

6 While reversing and remanding for a new trial on other grounds, the Court noted there was no abuse of discretion by the trial judge concerning his failure to recuse himself.

Disqualification has been filed,[7] and <u>not even as to Mr. Vue</u>.

Second, the denial of the OFPD's Motions to Withdraw[8] is presented as proof of "lack of impartiality." As the Court said in the <u>Vue</u> case in Doc. No. 101, at 9, "If the FPD's Office in its professional opinion believes that the Court's Memorandum Order Denying Defendant's Motion to Stay Proceedings is erroneous, it should follow the proper procedure and file an appeal or seek a writ of mandamus as previously announced. . . ." Instead, the OFPD withdrew the appeal of the four complained of Orders relating to the Motions to Withdraw. Thus, the OFPD seeks a blanket disqualification of this Court in 21 unrelated criminal cases based upon allegedly incorrectly decided Orders and proceedings relating thereto in the <u>Vue</u> case, where the FPD's Office has withdrawn the appeals thereof (without prejudice).

Third, as further purported evidence of this Court's alleged lack of impartiality, the OFPD relies heavily on in-court exchanges between the Court and Mr. Thomas McGough, which the OFPD offers as proof of some bias or animosity toward Mr. McGough. Nothing could be further from the truth.

The OFPD appears not to be aware that Tom McGough's father, Walter T. McGough, for almost 20 years, was this Court's boss, mentor, confidant, and "father in the law," along with former Chief Judge Collins J. Seitz, for whom this Court clerked from 1972-1973. Tom McGough followed in his father's illustrious footsteps, and soon earned a sterling reputation as a highly effective, ethical and successful lawyer in his own right. Thomas McGough and this

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[7] In fact, several defendants represented by the OFPD are in multi-defendant cases so the total affected defendants are 31 in number.

[8] The OFPD filed a third Motion to Withdraw on September 3, 2010 (Doc. No. 110), which this Court denied by Order of September 7, 2010. (Doc. No. 112).

Court both attended the University of Virginia; both served on the Editorial Board Virginia Law Review, School of Law, of the University of Virginia; both clerked for Chief Judge Collins J. Seitz; and both were partners at Reed Smith Shaw & McClay (now Reed Smith LLP). In short, the Court holds Mr. McGough in the highest regard, personally and professionally, and nothing in the Vue case has altered that opinion.

While the OFPD extracts select comments by the Court at the suppression and guilty plea hearings as evidence of some bias or animosity to Tom McGough and Reed Smith LLP, understanding those remarks in the context of the proceeding at that point and the Court's concerns, as placed on the record, undermines its argument. As the transcript also reflects, the Court was simply encouraging everyone – including the Court – to "think through the issues." See Transcript, Suppression Hearing (Doc. No. 86) at 37-38. As the Court explained, Mr. McGough's "formal appearance will potentially have impact not only on this Court, which is fine, it may have an impact on other judges if I have to move any Reed Smith cases; so I think everybody needs to take a deep breath and think about what's happening . . . ." Id. "The FPD's perception of animosity between Tom McGough and this Court is not well-founded nor is it supported by the record, and does not constitute evidence of bias or lack of impartiality.

Fourth, the Court's concern at that stage of the proceedings was not with Mr. McGough's representing or advising the OFPD in the abstract. To the contrary, the Court's concern arose in a very specific context involving the highly unusual spectacle of the OFPD appearing in Court with counsel to represent it (or perhaps advise it) in the matter before the Court, in furtherance of its institutional interests. At that point, the announced institutional interests of the OFPD compelled it to seek a Writ of Mandamus from the Court of Appeals to prevent this Court from

disputing the OFPD's claim of conflict of interests or from balancing that claim against the Court's, public's and the government's interests by requiring just a bit more by way of particulars about the alleged conflict from the OFPD.

A Writ of Mandamus is filed as an original action in the Court of Appeals, and it is an action that is seldom pursued. When it is pursued, it is often an intense, adversarial action between the movant and the respondent, namely the Court. In the unusual if not unique circumstances of these proceedings, and the adversarial nature of a Writ of Mandamus, this Court expressed some concern about any appearance of partiality or bias that might be perceived by reasonable observers were the Court to preside over cases involving Mr. McGough or his law firm while the mandamus petition was pending.

At the suppression hearing, the Court explained that the Court was "thinking through" some of the issues and problems caused by the OFPD's pointed litigation tactics, and said so on the record, stating that "it's not just an appearance, it's a mandamus, which will be directed to me as the Court, it will obviously create a potential conflict at that point . . . [and] depending on how it goes, there will be a motion to have me recused from the case. And so I just think it's certainly possible that we could – that the firm would find itself in conflict with me, or at least I would then have to make the decision that it would be more prudent for me not to consider – to continue with those – with those cases. I haven't made a decision on that; I didn't know you were going to be here." Id. At 38.

Ultimately, upon further reflection, the Court announced, on the record near the conclusion of the change of plea hearing, that it did not think it necessary to recuse from Mr. McGough's cases or from any of the law firm's cases. See Transcript, Change of Plea Hearing

(Doc. No. 100), at 53 ("Mr. McGough asked me to consider a matter of recusal from Reed Smith cases. In light of reviewing the record, his statement, I will review that and will not recuse myself, but I will consider disclosing that matter at a status conference with the current one Reed Smith case I have."). And, despite its unambiguous statements that it intended to seek a Writ of Mandamus in the Court of Appeals, the mandamus petition never materialized, and the Court's concerns about this inherently adversarial action and how to handle litigation before the Court involving the OFPD's champion or his law firm evaporated.

Fifth, the United States District Courts also have constitutional and institutional concerns that are not insubstantial. Recently, this Court has become acutely aware of certain few AFPDs' increasingly common practice of filing numerous, boilerplate motions for extensions of time, in light of unfortunate real world results in the Hall and Vue cases. This Court has attempted to encourage the OFPD to take remedial measures to correct the problem going forward. As the Court said in its Order Continuing Proceedings Pending Ruling on Motion for Disqualification, on September 1, 2010 (Doc. No. 45 in United States v. Peays, 10cr0070) at ¶5 as follows:

> Instead of privately working with its less experienced attorney's, and privately implementing quality control procedures and other best practices relating to the impact of the filing of continual motions for extensions of time in light of the potential sentencing guidelines range, to make sure that such situations never happen again, the FPD's Office blames the Judge. Such conduct does not remedy the dreadful situation of a defendant sitting in prison for more days and months than his or her actual sentence should be.

In conclusion, under the applicable legal test for judicial disqualification, the Court finds that the OFPD has failed to establish any lack of impartiality on the part of this Court in the Vue case, and necessarily therefore, in any of the other 21 cases that rely solely on Vue. On the

contrary, as the Court said in the Peays matter in Doc. No. 45 at ¶5 as follows:

> This Court having served this District for more than 7 ½ years has consistently been impressed with the zeal and quality of the representation of the AFPDs and counted them as professional colleagues in our great system of justice.

The Court trusts that after traversing this perceived (and unnecessary) obstacle along the road, the Court will continue to be impressed by the work and professionalism of the AFPD's, and will continue to enjoy our professional relationships.

B. Order of September 9, 2010 and Need for Appellate Guidance

In the face of the Motions to Disqualify in the 21 criminal cases, the Court entered its Order Continuing Proceedings Pending Ruling on Motion for Disqualification, on September 1, 2010 (Doc. No. 45 in United States v. Peays 10cv0070) at ¶3 as follows:

> The Court will grant any pending Motion to Disqualify, if and when it is established on the record that this request is the personal request of a defendant, as opposed to the desire of the FPD's Office, and the Court will implement an automatic disqualification for all future criminal cases where a defendant is represented by an attorney from the FPD's Office. This automatic disqualification will not include any cases where a defendant is represented by any of the other excellent criminal defense attorneys of our Bar, not actually employed by the FPD's Office.

A similar Order was entered in the other cases.

By tactically moving the disqualification issue from the Vue case to 21 unrelated criminal cases, the OFPD has injected numerous legal, logistical, and potential speedy trial issues not only in cases before this Court, but for any other Judges in this District involved in transfer of any of those cases. If the OFPD believed that this Court erred when it denied its Motions to Withdraw, it should have continued the Vue appeals, so that the main prong of the Motions for Disqualification, the propriety of the Court's rulings on said Motions to Withdraw, could have

been decided within the context of the Vue case, instead of in 21 other unrelated criminal cases. Alternatively, the OFPD could have chosen one unrelated criminal case in which to litigate the issue. By filing in 21 unrelated criminal cases involving 31 different defendants, which cases are in various different stages from recently filed, trial ready (one case, Peays, was scheduled for jury selection in a few days), pre-plea, post-plea, pre-sentencing, post-conviction, post-sentencing, and violation of supervised release, the OFPD moved from a simple decision making model to a needlessly complex model.

This Court entered the September 1, 2010 Order to conserve judicial and legal resources and to avoid the situation where 21 defendants could argue "lack of impartiality" in their respective cases in any future appeal. Obviously, by filing the Motions for Disqualification in these other 21 criminal cases, appeal from any denial of said Motion would be entirely dependent upon the record in the Vue case, of which the other defendants, and possibly even their counsel, may not be fully aware.

Further, the Court also implemented "an automatic disqualification of all future criminal cases where a defendant is represented by an attorney from the FPD's Office," so that the number of affected cases did not increase beyond the 21 criminal cases, until the United States Court of Appeals for the Third Circuit could hear an appeal and provide much needed guidance to this and the other Judges of this District.

Based upon a review of the Government's Responses (e.g., Doc. No. 24 in Cothron (10cr0027), Doc. No. 274 in Sims (09cr0292), Doc. No. 46 in Peays (10cr0070), and similar responses in the other 19 cases), and recognizing the public interest is not served by unwarranted recusals which encourage judge-shopping, this Court believes that the disqualification issues and

the underlying issues regarding this Court's authority and discretion to deny Motions to Withdraw as Court appointed counsel, should be addressed in only a few fully developed cases in advanced stages of litigation, in which cases the Court will reconsider and will not disqualify itself.

By this Memorandum Opinion and Order, if there is an appeal raising the relevant issue common to all 21 Motions for Disqualification, the matter can be decided by a fully informed Court of Appeals on a well developed record, including the record in the case in which the complained of rulings and Court proceedings in fact occurred -- the Vue case. The four cases in advanced stages of litigation are the Vue case and the Cunningham, Clemons and Nance cases.

In the other cases, the Court will grant the Motions for Disqualification, and deny the Government's Motions for Reconsideration, based on the interests of fair and effective administration of justice, in that disqualification will remove the cloud over those cases and eliminate perhaps lengthy delays for the individual defendants that would ensue were the Court to deny the motions to recuse. Those cases will be transferred to active and senior Judges of this District, and one Judge of the Court of Appeals, who have generously consented to having the cases transferred to them. For their support, this Court is quite appreciative.

C. Sentencing of Mr. Vue

Mr. Vue now has pled guilty and is ready for sentencing on September 22, 1010. Mr. Vue will have served approximately 16 months of the presumptively correct 15 to 21 month sentencing guideline range.[9] Based upon its review of the Pre-Plea Presentence Investigation

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[9] There were no substantive objections to the Probation Office's calculation of the appropriate guideline range for imprisonment.

Report (Doc. No. 107), the Addendum (Doc. No. 112), the Sentencing Recommendation (Doc. No. 113), and the entire record in the case, this Court intends (subject to argument at the hearing) to sentence Mr. Vue to a term of imprisonment near the low end of the guidelines range, time served, with a term of supervision at the maximum end of the guidelines range. Mr. Vue will therefore be released, having served his sentence, and will report to the Probation Office. He needs to be closely monitored and supervised due to his substance abuse issues, and the Probation Office is equipped to provide such supervision.

XXI. Rulings on the Numerous OFPD Motions to Disqualify Judge and Government's Motions to Reconsider the Court's Decision to Disqualify Itself in All Future OFPD Cases

Because the Court finds no justification for the OFPD's Motions for Disqualification, on the one hand; yet, on the other hand, finds that to deny all said Motions in 21 cases would cause disruption to the orderly proceeding of these cases and potential for delays that would have an unfair impact on the affected defendants; the Court has balanced the competing interests and determines that it is in the best interests of justice to grant said Motions for Disqualification and deny the government's Motions to Reconsider in 17 of the 21 cases.[10]

As to two of the remaining cases (Cunningham, 07cr0298 (which featured 12 Motions for Extensions of Time) and Clemons, 08cr0028 (which featured 15 Motions for Extensions of Time)), this Court has been the trial judge in both cases – through extensive pre-trial motions practice with evidentiary hearings and rulings, and through jury trials with guilty verdicts – and

[10] Of the 17 cases, 1 case is trial ready, 3 cases are in the early stages, 5 cases are ready for a sentencing hearing, 2 cases are ready for a combined guilty plea and sentencing hearing, 3 cases are ready for a resentencing hearing, 2 cases are ready for hearings on revocation of supervised release, and 1 case has nothing pending.

now both cases are ready for sentencing (Cunningham's sentencing was set for 9/10/10 and Clemons' sentencing was set for 9/24/10). Given this Court's knowledge of these defendants and its involvement in their proceedings, and given the time that would be involved for a substitute judge to get up to speed, it is not in the public interest nor does it constitute wise and prudent use of judicial resources for this Court to withdraw from these cases at such a late stage. (Note that Cunningham had 206 docket entries and Clemons had 147 dockets entries.)

Thus, the Court will deny the Motions for Disqualification in these two cases, and grant the government's Motions to Reconsider, and having reconsidered, will not withdraw as the trial and sentencing judge therein. The sentencing hearings will be rescheduled promptly.

In the Nance case, (09cr0193), the Court has already conducted an evidentiary hearing on a Motion to Suppress, has made evaluations of credibility and reached credibility determinations, received and reviewed proposed Findings of Fact and Conclusions of Law, drafted an opinion and order, and is prepared to rule. As with Cunningham and Clemons, to have another trial judge conduct a new suppression hearing would not be a wise and prudent use of judicial resources. Accordingly, the Court will deny the Motion for Disqualification in Nance and grant the Motion to Reconsider, and will issue the decision on the Motion to Suppress forthwith, and proceed from there to trial or plea.

As to the Antwon Williams case, the Court will conduct a hearing for the purposes of determining whether he consents to disqualification or objects and chooses to be sentenced by this Court. Additional counsel will be appointed for that hearing.

As to the "blanket disqualification" in all future OFPD cases, which is repeated in the Order attached hereto, and in Orders to be entered in the Cunningham, Clemons and Nance

cases, so that the matter may be presented and considered by the United States Court of Appeals for the Third Circuit in a concrete context in any appeal in one or more of the four cases, this Order will remain in effect until December 31, 2011, or until a decision by the Court of Appeals, whichever occurs first.[11]

An appropriate Order will be entered reflecting the above rulings.

September 20, 2010

s/ Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: all ECF registered counsel

[11] There is one additional case involved, but it is under seal. The Court will deal with that case in the near future.

CERTIFICATE OF SERVICE

I, Eric D. Freed, Esquire, hereby certify that on November 11, 2020, that I caused a true and correct copy of the foregoing Memorandum of Law in Support of Defendant Federal Insurance Company's Motion for Disqualification and related Exhibits to be served upon all counsel of record via the Clerk of Court by using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record for the parties.

COZEN O'CONNOR

/s/ Eric D. Freed
Eric D. Freed, Esq.

Attorney for Defendant

DATED: November 11, 2020